

**ASSET PURCHASE AGREEMENT**

**THIS AGREEMENT** made as of the 27th day of February, 2004,

**AMONG:**

**BESS EATON DONUT FLOUR CO., INC.,**  
a corporation existing under the laws of  
the State of Connecticut

(hereinafter referred to as "Bess Eaton")

OF THE FIRST PART,

- and -

**LOUIS A. GENCARELLI, SR.**  
of Westerly in the State of Rhode Island

(hereinafter referred to as "Gencarelli")

OF THE SECOND PART,

- and -

**TIM HORTONS (NEW ENGLAND), INC.,**  
a corporation existing under the laws of  
the State of Delaware

(hereinafter referred to as "Tim Donut")

OF THE THIRD PART.

WHEREAS Gencarelli is the sole shareholder of Bess Eaton and Tim Donut wishes to acquire from Bess Eaton and Gencarelli certain assets used in or in connection with the business carried on by Bess Eaton; and

WHEREAS, as provided below, each of Bess Eaton and Gencarelli intends to commence Chapter 11 cases under the Bankruptcy Code to effect the acquisition by Tim Donut;

THIS AGREEMENT WITNESSES THAT in consideration of the respective covenants, agreements, representations, warranties and indemnities of the parties herein contained, the parties agree as follows:

## 1. INTERPRETATION

**1.1 Defined Terms.** For the purposes of this Agreement, the following terms shall have the respective meanings set out below and grammatical variations of such terms shall have corresponding meanings:

- (a) **"Affiliate"** means, with respect to any person, any other person which directly or indirectly Controls or is Controlled by or is under direct or indirect common Control with such first-mentioned person or any other person which is directly or indirectly Controlled by a person's estate and any family trusts in which such person is beneficially interested or by the executor of such person's estate and in the case of Bess Eaton includes Gencarelli in his individual capacity;
- (b) **"Approval Order"** has the meaning set out in Section 7.1(c);
- (c) **"Assumed Contracts"** has the meaning set out in Section 2.1(f);
- (d) **"Assumed Liabilities"** has the meaning set out in Section 4.1, but for greater certainty does not include the Excluded Liabilities;
- (e) **"Assumed Licenses"** has the meaning set out in Section 2.1(g);
- (f) **"Audited Financial Statements"** means the audited financial statements of Bess Eaton as at and for the financial years ended December 25, 2001 and December 24, 2002, including the notes thereto and the report of the Vendor's auditors thereon, a copy of which is annexed hereto as Schedule 1.1;
- (g) **"Bankruptcy Case"** and **"Bankruptcy Cases"** have the meanings set out in Section 7.1(a).
- (h) **"Bankruptcy Code"** means the United States Bankruptcy Code, Title 11 of the United States Code.
- (i) **"Bankruptcy Court"** means the United States Bankruptcy Court for the District of Rhode Island;
- (j) **"Benefit Plan"** means those Employee Plans which are not Pension Plans;
- (k) **"Benefit Plan Members"** means all Employees who accept employment with the Purchaser and former employees of Bess Eaton employed primarily in connection with the Purchased Business (and their spouses, beneficiaries, dependants or estates, as applicable) who have any entitlement or coverage under the Benefit Plans immediately prior to the Closing Date;
- (l) **"Bess Eaton Assets"** has the meaning set out in Section 2.1;
- (m) **"Bess Eaton Assets Purchase Price"** has the meaning set out in Section 3.1;

- (n) **"Bidding Procedures Order"** has the meaning set out in Section 7.1(b).
- (o) **"business day"** means any day which is not a Saturday, a Sunday or a statutory holiday in Providence, Rhode Island or Dublin, Ohio;
- (p) **"Chapter 11"** means Chapter 11 of the Bankruptcy Code.
- (q) **"Claim"** has the meaning set out in Section 11.3;
- (r) **"Claimants"** has the meaning set out in Section 7.1(c)(i).
- (s) **"Closing Date"** means the date that is the second business day following the expiration of the appeals period of the entry of the Approval Order with no stay or injunction having been granted or pending, or such other date as the Vendor and the Purchaser may mutually agree upon;
- (t) **"Closing Date Payment"** has the meaning set out in Section 3.3(a);
- (u) **"COBRA"** means the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.
- (v) **"Confidentiality Agreements"** has the meaning set out in Section 1.8;
- (w) **"Contract"** means any agreement, indenture, contract, lease, sublease, deed of trust, license, option, instrument or other commitment, whether written or oral, including the Leases of Real Property;
- (x) **"Control"** means (i) in relation to a person that is a corporation, the ownership, directly or indirectly, of voting securities of such person carrying more than fifty percent (50%) of the voting rights attaching to all voting securities of such person and which are sufficient, if exercised, to elect a majority of its board of directors, or (ii) in relation to a person that is a partnership, limited partnership, trust or other similar entity, the ownership, directly or indirectly, of voting securities of such person carrying more than fifty percent (50%) of the voting rights attaching to all voting securities of the person or the ownership of other interest entitling the holder to exercise control and direction over the activities of such person (and "Controls" and "Controlled" shall be construed accordingly).
- (y) **"Deposit"** has the meaning set out in Section 3.4.
- (z) **"Direct Claim"** has the meaning set out in Section 11.3;
- (aa) **"Effective Time"** means 12:01 A.M. (Providence time) on the Closing Date, or such other time on the Closing Date as the Vendor and the Purchaser may mutually determine;
- (bb) **"Employee Plans"** has the meaning set out in Section 5.28;

- (cc) **"Employees"** has the meaning set out in Section 5.30, as updated in accordance with Section 7.14(a);
- (dd) **"Employment Legislation"** means, collectively all laws, whether statutory, administrative or common law, governing the relationships, rights and obligations of employers and employees in any jurisdiction in which the Purchased Business is conducted;
- (ee) **"Encumbrance"** means any encumbrance, lien, charge, hypothecation, pledge, mortgage, title retention agreement, security interest of any nature, adverse claim, exception, reservation, easement, restriction, right of occupation, any matter capable of registration against title, option, right of pre-emption, privilege or any Contract to create any of the foregoing;
- (ff) **"Environmental Costs"** means, without limitation, any actual or potential cleanup costs, remediation, removal, or other response costs, costs of repair, construction, alteration and installation and preventive and remediation costs (which without limitation shall include costs to cause the Purchased Assets including any leased property to come into compliance with Environmental Laws in a manner approved for such real property by all applicable environmental authorities), investigation costs (excluding the cost of conducting Phase I and Phase II environmental audits but including without limitation fees of consultants arising subsequent to conducting such Phase I and Phase II audits, experts in connection with any environmental investigation, testing, audits or studies), losses, liabilities, or obligations (including without limitation, liabilities or obligations under any lease or other contract), payments, damages (including without limitation any actual, incidental, special, exemplary, punitive or consequential damages under any statutory laws, common law or equitable cause of action or contractual obligations or otherwise, including without limitation damages (a) of third parties for personal injury or property damage, (b) to natural resources or to the environment, or (c) to Purchaser, including, without limitation, all direct costs, loss of tenants, lenders, investors or buyers, civil, administrative, quasi-criminal or criminal fines, penalties and monetary and non-monetary sanctions, judgments, and amounts paid in settlement arising out of or relating to or resulting from any environmental matter; in each case, for which Purchaser would be required to accrue or to establish a reserve under U.S. general accepted accounting principles in its financial statements, had the transactions contemplated by this Agreement been closed;
- (gg) **"Environmental Cost Estimate"** has the meaning set out in Section 7.4(b);
- (hh) **"Environmental Law"** means any statute, code, by-law, ordinance, regulation, published policy, permit, consent, approval, license, judgment, order, writ, decision, directive, common-law rule (including, without limitation, the common law respecting nuisance and tortious liability), decree, agency interpretation, injunction, agreement or authorization or requirement, whether federal, state, territorial, municipal or local, relating to;

- (1) filings, registrations, emissions, discharges, spills, releases or threatened releases of Hazardous Substances or materials containing Hazardous Substances into the air, surface or ground water, water courses, water or sewage treatment works, drains, sewer systems, wetlands, septic systems or onto land;
- (2) the import, export, use, distribution, treatment, storage, disposal, discharge, packaging, handling, processing, manufacturing, transportation, shipment, clean-up or other remediation of Hazardous Substances, materials containing Hazardous Substances or the equipment or apparatus containing Hazardous Substances; and
- (3) pollution or the protection of human health or the environment, including workplace health or safety and natural resources;
- (ii) **"Environmental Permits"** has the meaning set out in Section 5.25(b);
- (jj) **"Excluded Assets"** has the meaning set out in Section 2.3;
- (kk) **"Excluded Employees"** has the meaning set out in Section 7.13(b);
- (ll) **"Excluded Leases"** has the meaning set out Section 7.13(b).
- (mm) **"Excluded Liabilities"** has the meaning set out in Section 4.2;
- (nn) **"Financial Statements"** means the Audited Financial Statements and the Interim Financial Statements;
- (oo) **"Financial Statement Date"** means December 24, 2002;
- (pp) **"Gencarelli Assets"** has the meaning set out in Section 2.2;
- (qq) **"Gencarelli Assets Purchase Price"** has the meaning set out in Section 3.2;
- (rr) **"Gencarelli Guaranty"** has the meaning set out in Section 7.18.
- (ss) **"Gencarelli Leases"** has the meaning set out in Section 5.10(b);
- (tt) **"Gencarelli Mortgage Guaranty"** has the meaning set out in Section 7.25.
- (uu) **"Hazardous Substances"** means any substance, in solid, liquid or gaseous form, which is
  - (1) a substance considered, defined, designated or classified by or under an Environmental Law to be dangerous goods, a contaminant, a hazardous product, a hazardous substance, a hazardous waste, a hazardous material, a toxic or designated substance which may adversely affect human health or the environment or a waste (including without limitation, asbestos, polychlorinated biphenyls, oil, petroleum and mold);

- (2) a substance with respect to which any Environmental Law requires environmental investigation, monitoring, reporting or remediation; or
- (3) a substance capable of posing a risk of injury or damage to health, safety, property or the environment, including but not limited to, without in any way limiting the definition in Section 1.1(uu)(1), all substances, wastes, pollutants, contaminants, chemicals or materials regulated by or defined, designated or classified under any applicable Environmental Law;
- (vv) **"Indemnified Party"** has the meaning set out in Section 11.3;
- (ww) **"Indemnifying Party"** has the meaning set out in Section 11.3;
- (xx) **"Intellectual Property"** has the meaning set out in Section 2.1(h);
- (yy) **"Interim Financial Statements"** means the weekly sales figures provided to the Purchaser through Closing and the unaudited financial statements of Bess Eaton as at and for the 12 month period ended December 30, 2003 and the 2004 financials for the period ending as at the Closing Date, a copy of each of which will, once available, be annexed hereto as Schedule 1.1(yy);
- (zz) **"Internal Revenue Code"** means the Internal Revenue Code of 1986, as amended;
- (aaa) **"Leased Property"** means the real property that is leased by Bess Eaton under Leases of Real Property;
- (bbb) **"Leases of Real Property"** has the meaning set out in Section 2.1(a);
- (ccc) **"Licenses"** has the meaning set out in Section 5.17;
- (ddd) **"Losses"**, in respect of any matter, means all claims, demands, proceedings, losses, damages, liabilities, deficiencies, costs and expenses (including, without limitation, all reasonable legal and other professional fees and disbursements, interest, penalties and amounts paid in settlement) arising directly or indirectly as a consequence of such matter;
- (eee) **"Material Contract"** means any contract, agreement or commitment that is material to Bess Eaton or the Purchased Business or that requires or may require the provision by Bess Eaton to any person of goods or services, or the making of a financial obligation by Bess Eaton, having a cost or fair market value in excess of \$10,000, a remaining term of more than one year, or which requires more than 60 days notice to terminate it;
- (fff) **"Permitted Encumbrances"** means the following items provided they are of public record:

- (1) the reservations, limitations, provisos and conditions expressed in any statutory exceptions to title (provided the same have been complied with) and provided that, in the opinion of the Purchaser, acting reasonably, the same do not materially interfere with the purposes for which the Purchased Asset is intended to be used by the Purchaser;
  - (2) easements, servitudes, encroachments, party wall agreements, rights of way, restrictive covenants and other similar rights and agreements (including, without limiting the generality of the foregoing, easements, rights of way and agreements for sewers, drains, gas and water mains or electric light and power or telephone, telecommunications or cable conduits, poles, wires and cables) which, in the opinion of the Purchaser, acting reasonably, do not and will not in the aggregate materially adversely affect the value of the Purchased Asset or materially interfere with the purposes for which it is intended to be used by the Purchaser;
  - (3) liens for taxes, assessments or governmental charges or levies not yet due or delinquent, which shall be adjusted as of the Closing Date;
  - (4) assignments of insurance provided to landlords (or their mortgagees) pursuant to the terms of any lease, and liens or rights reserved in any lease for rent or for compliance with the terms of such lease;
  - (5) security given in the ordinary course of business to any public utility, municipality or government or to any statutory or public authority by the Vendor, other than security for borrowed money;
  - (6) unregistered purchase money security interests arising under contracts for the supply of goods and materials entered into in the ordinary course of business which secure the unpaid balance of the purchase price for goods and/or materials purchased thereunder which are due and payable (and have been outstanding) for not more than 30 days after delivery of the invoice therefor;
  - (7) subdivision, site-plan, development or other municipal agreements provided such are complied with and which, in the opinion of the Purchaser, acting reasonably, do not and will not in the aggregate materially adversely affect the value of the Purchased Asset or materially impair the current use of any parcel of the real property included in the Purchased Assets;
- (ggg) **"Prime Rate"** means the annual variable rate of interest quoted or published from time to time by the Wall Street Journal Midwest Edition as the "prime rate" or "base rate" of interest charged by it for US dollar loans made in the United States;
- (hhh) **"Proceedings"** has the meaning set out in Section 4.2(e);

- (iii) **"Purchase Price"** means the Bess Eaton Assets Purchase Price plus the Gencarelli Assets Purchase Price;
- (jjj) **"Purchased Assets"** means collectively the Bess Eaton Assets and the Gencarelli Assets but does not include the Excluded Assets;
- (kkk) **"Purchased Business"** means the business carried on by Bess Eaton consisting primarily of coffee and donut shops operated under the name Bess Eaton;
- (lll) **"Purchaser"** means Tim Donut;
- (mmm) **"Purchaser Benefit Plans"** has the meaning set out in Section 7.14(a);
- (nnn) **"related persons"** or **"persons related to each other"** are
  - (1) individuals connected by blood relationship, marriage or adoption;
  - (2) a corporation and
    - (i) a person who controls the corporation, if it is controlled by one person;
    - (ii) a person who is a member of a related group that controls the corporation; or
    - (iii) any person related to a person described in subparagraph (i) or (ii); and
  - (3) any two corporations
    - (i) if they are controlled by the same person or group of persons;
    - (ii) if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,
    - (iii) if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,
    - (iv) if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation;
    - (v) if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporations; or



- (vi) if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.
- (4) Where two corporations are related to the same corporation within the meaning of subsection (2) or (3) they shall be deemed to be related to each other.
- (5) Where there has been an amalgamation or merger of two or more corporations and the new corporation formed as a result of the amalgamation or merger and any predecessor corporation would have been related immediately before the amalgamation or merger if the new corporation were in existence at that time, and if the persons who were the shareholders of the new corporation immediately after the amalgamation or merger were the shareholders of the new corporation at that time, the new corporation and any such predecessor corporation shall be deemed to have been related persons.
- (ooo) **"Shareholder"** means a shareholder of Bess Eaton;
- (ppp) **"Sites to be Closed"** has the meaning set out in Section 7.13(b);
- (qqq) **"Third Party Claim"** has the meaning set out in Section 11.3;
- (rrr) **"Transferred Employees"** has the meaning set out in Section 7.16(a);
- (sss) **"Vendor"** means Bess Eaton and Gencarelli, collectively, "Individual Vendor" means Gencarelli, and "Corporate Vendor" means Bess Eaton, and, with respect to any representation, warranty, covenant, condition or other term in this Agreement creating an obligation or liability of Vendor, means Bess Eaton and Gencarelli acting jointly and severally; and
- (ttt) **"Workers' Compensation Tribunal"** means, collectively, the workers compensation authorities which are applicable to the Employees.

**1.2 Currency.** Unless otherwise indicated, all dollar amounts in this Agreement are expressed in US funds.

**1.3 Sections and Headings.** The division of this Agreement into Articles and Sections and the insertion of headings and a table of contents are for convenience of reference only and shall not affect the interpretation of this Agreement. Unless otherwise indicated, any reference in this Agreement to an Article, Section or Schedule refers to the specified Article or Section of or Schedule to this Agreement.

**1.4 Number, Gender and Persons.** In this Agreement, words importing the singular number only shall include the plural and *vice versa*, words importing gender shall include all genders and words importing persons shall include individuals, corporations, partnerships,

associations, trusts, unincorporated organizations, governmental bodies and other legal or business entities of any kind whatsoever.

**1.5 Accounting Principles.** Any reference in this Agreement to generally accepted accounting principles refers to generally accepted accounting principles which have been established in the United States, including those approved at the applicable time by the Financial Accounting Services Board or any successor body thereto.

**1.6 Bess Eaton's and Gencarelli's Knowledge.** For the purposes of any reference in this Agreement to "knowledge of the Vendor", "knowledge of Bess Eaton", "knowledge of Gencarelli", or "knowledge of Bess Eaton and Gencarelli", the knowledge (actual or deemed) of either Vendor shall be deemed to be the knowledge of each Vendor, and with respect to Bess Eaton shall be deemed to have knowledge of any fact or circumstance which is, or with ordinary diligence ought reasonably to be known by: (i) any person holding the office or position or fulfilling the function of a director, officer or senior manager of Bess Eaton; or (ii) any other employee or agent of Bess Eaton who, having regard to his or her position, job description or responsibilities, should reasonably be expected to have knowledge or information relevant to the matter in question.

**1.7 Ordinary Course of Business.** Any reference in this Agreement to the "ordinary course of business" shall mean the ordinary and normal course of the Purchased Business, consistent with the manner in which the Purchased Business has been carried on for the previous 2 years but excluding the transactions listed in Schedule 1.7. Disclosure of the non ordinary course transactions on Schedule 1.7 does not qualify any of Vendor's representations except where ordinary course of business is used nor does it mean Purchaser cannot reasonably rely on the Vendor's representations.

**1.8 Entire Agreement.** This Agreement, including the schedules and exhibits, constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes and terminates all prior agreements (including the letter of intent dated November 6, 2003, as amended, which expired), understandings, negotiations and discussions, whether written or oral other than two Confidentiality Agreements dated November 6, 2003 (the "Confidentiality Agreements"). There are no conditions, covenants, agreements, representations, warranties or other provisions, express or implied, collateral, statutory or otherwise, relating to the subject matter hereof except as herein provided.

**1.9 Time of Essence.** Time shall be of the essence of this Agreement.

**1.10 Applicable Law.** With respect to any claim arising out of, or related to the transactions contemplated by this Agreement:

- (a) each party agrees that this Agreement shall be governed by the internal laws of the Commonwealth of Massachusetts, excluding principles of conflicts or choices of law, except as otherwise set forth in the mortgages referred to herein;
- (b) each party irrevocably submits to the exclusive jurisdiction of the Bankruptcy Court so long as it has jurisdiction over the matter(s) in dispute, and otherwise to the exclusive jurisdiction of the courts of the Commonwealth of Massachusetts

and the federal courts located in the Commonwealth of Massachusetts; and accepts, generally and unconditionally, the exclusive jurisdiction of any such court and any related appellate court and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement subject, in each case, to all rights to appeal such decisions to the extent available to the parties; and

- (c) each party irrevocably waives:
- (i) any objection which it may have at any time to the laying of venue of any suit, action or proceeding arising out of, or relating to the transactions contemplated by, this Agreement in any such court;
  - (ii) any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum;
  - (iii) the right to object, with respect to such suit, action or proceeding brought in any such court, that such court does not have jurisdiction over such party; and
  - (iv) the right to a determination by a jury of any matter at issue in any such action or proceeding arising out of or relating to the transactions contemplated by this Agreement.

each party agrees that service of process upon it in any such suit, action or proceeding shall be deemed in every respect effective service of process upon it if given in the manner set out in Section 12.2 hereof; provided, however, that such service shall not be effective if made only by facsimile or similar means of recorded electronic communication."

**1.11 Construction.** The language of this Agreement has been mutually agreed to by the parties to express their understanding and is not to be considered to be the language of any one party or construed against any party.

**1.12 Severability.** If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, such determination shall not impair or affect the validity, legality or enforceability of the remaining provisions hereof, and each provision is hereby declared to be separate, severable and distinct.

**1.13 Best Efforts.** The parties acknowledge and agree that, for all purposes of this Agreement, an obligation on the part of any party to use its best efforts to obtain any waiver, consent, approval, permit, license or other document (i) shall apply only to the extent not prohibited by the Bankruptcy Code, and (ii) shall not require such party to make any payment to any person for the purpose of procuring the same, other than payments for amounts due and payable to such person under the terms of any agreement as it stood prior to the date of this Agreement, payments for incidental expenses incurred by such person and payments required by any applicable law or regulation, nor permit the Vendor (without the consent of the Purchaser,

which consent may be arbitrarily withheld) to change any contractual rights or obligations in any Contract included in the Purchased Assets or constituting any of the Assumed Liabilities.

**1.14 Schedules.**

(a) The following Schedules are attached to and form part of this Agreement:

Schedule 1.1	-	Audited Financial Statements
Schedule 1.7	-	Transactions Out of Ordinary Course
Schedule 2.1(a)	-	Leased Property
Schedule 2.1(b)I	-	Machinery and Equipment Owned
Schedule 2.1(b)II	-	Machinery and Equipment to be Purchased from Eastern
Schedule 2.1(c)	-	Leased Vehicles
Schedule 2.1(f)	-	Contracts To Be Assumed
Schedule 2.1(h)	-	Intellectual Property
Schedule 2.1(i)	-	Software
Schedule 2.2(a)	-	Gencarelli Land and Building
Schedule 2.2(b)	-	Gencarelli Leases
Schedule 2.2(c)	-	Gencarelli Leases to Bess Eaton
Schedule 2.2(d)	-	Gencarelli Third Party Leases
Schedule 2.3(g)	-	Excluded Assets
Schedule 3.2(b)	-	Promissory Note
Schedule 3.5(a)	-	Allocation of Bess Eaton Assets Purchase Price
Schedule 3.5(b)	-	Allocation of Gencarelli Assets Purchase Price
Schedule 5.1	-	Jurisdictions in which Purchased Business Located
Schedule 5.5	-	Location of Assets
Schedule 5.13	-	Insurance Policies
Schedule 5.15	-	Material Contracts
Schedule 5.17	-	Licenses

Schedule 5.18A	-	Regulatory Consents and Approvals
Schedule 5.18B	-	Contractual Consents and Approvals
Schedule 5.19	-	Interim Financial Statements - Exceptions to GAAP
Schedule 5.21	-	Changes since Financial Statement Date
Schedule 5.22	-	Related Party Transactions
Schedule 5.24	-	Litigation
Schedule 5.25	-	Environmental Matters
Schedule 5.28	-	Employee Plans
Schedule 5.29A	-	Collective Agreements
Schedule 5.29B	-	Work Stoppages
Schedule 5.30A	-	Head Office Employees
Schedule 5.30B	-	Absent Employees
Schedule 5.30C	-	Charges Under Employment Legislation
Schedule 5.30D	-	Workers' Compensation Benefits
Schedule 5.30E	-	Changes in Rating Assessment
Schedule 5.30F	-	Employee Claims
Schedule 6.1	-	Purchaser Jurisdictions
Schedule 6.4	-	Purchaser's Consents and Approvals
Schedule 7.16		Groton Property
Schedule 7.18	-	Gencarelli Guaranty
Schedule 7.25A	-	Description of Bakery and Office/Warehouse Property
Schedule 7.25B	-	Gencarelli Mortgage Guaranty
Schedule 7.26	-	Employees with COBRA Rights
Schedule 7.33		Wendy's International, Inc. Guaranty of Financial Capacity
Schedule 8.1(k)	-	Non-Competition Agreement

- (b) The following Schedules are to be prepared or updated subsequent to execution of the Agreement and initialed by all parties to signify their approval of such Schedules:

Schedule 1.1(II) - Interim Financial Statements (to be provided)

Schedule 2.1(b)(I)(Exhibit A) Computer Software (to be updated)

Schedule 3.5(a) - Valuation of Purchased Inventories (to be provided)

Schedule 5.28 Employee Plans (to be updated)

Schedule 5.30A - Employees (to be provided)

Schedule 7.15A - Excluded Employees (to be provided)

## 2. PURCHASE AND SALE OF PURCHASED ASSETS

**2.1 Bess Eaton Assets.** Subject to the provisions of this Agreement, Bess Eaton agrees to sell, assign and transfer to the Purchaser and the Purchaser agrees to purchase from Bess Eaton, effective as of 12:01 A.M. on the Closing Date, all of the property, assets and rights of Bess Eaton (other than the Excluded Assets), whether real or personal, tangible or intangible, of every kind and description and wheresoever situate, as a going concern (collectively, the "Bess Eaton Assets"), including, without limitation:

- (a) ***Leases of Real Property*** All rights of Bess Eaton (whether as lessee or lessor) under leases of real property described in Schedules 2.1(a) and 2.2(c) to be assumed by Bess Eaton and assigned to the Purchaser (the "Leases of Real Property"), together with all leasehold improvements relating thereto;
- (b) ***Machinery, Equipment and Furniture*** All of the assets of all kinds, whether or not affixed to the Leased Property, and other goods and chattels owned by Bess Eaton currently used to operate the Bess Eaton shops, including, without limitation, all of the machinery, equipment, computer hardware, fixtures, furniture, furnishings, parts, tooling and other fixed assets described in Schedule 2.1(b)(I) and the equipment leased by Bess Eaton from Eastern Bank as described in Schedule 2.1(b)(II) which Bess Eaton shall acquire on or immediately prior to Closing on the basis described in Section 7.21 (other than the Excluded Assets);
- (c) ***Leased Vehicles*** All trucks, cars and other vehicles leased by Bess Eaton which are described in Schedule 2.1(c);
- (d) ***Inventories*** All Bess Eaton inventories, including, without limitation, raw materials, finished goods, replacement parts and office supplies;

- (e) **Prepaid Expenses** All prepaid rent, security deposits and other prepaid expenses of Bess Eaton (subject to the claims and defenses of the parties to which such rent, security deposits, or other expenses were paid) other than those which relate to Excluded Liabilities;
- (f) **Agreements** All Contracts to which Bess Eaton is a party or by which it is bound which are listed on Schedule 2.1(f) (the "Assumed Contracts");
- (g) **Licenses and Permits** All licenses, permits, approvals, consents, registrations, certificates and other authorizations issued to or held by Bess Eaton in respect of the Purchased Business which are assignable by their terms or under the Bankruptcy Code or other law and which the Purchaser is willing to assume, including, without limitation, those described in Schedule 5.17 (collectively, all of the foregoing, including those not described in Schedule 5.17, the "Assumed Licenses");
- (h) **Intellectual Property** All registered or pending or common law intellectual property issued to or owned or held by Bess Eaton or in which Bess Eaton has an interest including, without limiting the generality of the foregoing, all trade or brand names, business names, domain names, trade-marks (including logos), trade-mark registrations and applications, service marks, service mark registrations and applications, copyrights, copyright registrations and applications, issued patents and pending applications and other patent rights, industrial design registrations, pending applications and other industrial design rights, trade secrets, proprietary information and know-how, inventions, inventors' notes, research data, blueprints, drawings and designs, recipes, formulae, processes, technology and other intellectual property issued to or owned or held by Bess Eaton or in which Bess Eaton has an interest, together with all rights under licenses, technology transfer agreements and other agreements or instruments relating to any of the foregoing (collectively, "Intellectual Property"), including, without limitation, the trade-marks, copyrights, patents, industrial designs, licenses and agreements described in Schedule 2.1(h);
- (i) **Computer Software** The computer software used by the Vendor listed on Schedule 2.1(i), and all rights under licenses and other agreements and instruments relating thereto (which rights shall be considered part of the Assumed Contracts);
- (j) **Books and Records** All books and records of Bess Eaton (other than its financial and accounting records and such other books and records required by law to be retained by Bess Eaton, copies of which will be made available to the Purchaser), including, without limitation, customer lists, sales records, price lists and catalogues, sales literature, advertising material, employee manuals, personnel records, supply records, inventory records, building permits, drawings, plans, septic system plans and permits, well water testing records, leases, deeds, and correspondence files (together with, in the case of any such information which is stored electronically, the media on which the same is stored);

- (k) **Insurance Proceeds Receivable** Insurance proceeds receivable, to the extent that they relate to the Purchased Assets or the Purchased Business, other than the Bess Eaton Mystic location 949 leasehold; and any interest of Bess Eaton in Environmental Insurance Underwriters policy or policies GU0680966 provided such interest is assignable by contract or under applicable law; and
- (l) **Goodwill** All goodwill including the exclusive right to use the name "Bess Eaton", or any variation thereof, as part of the name or style under which the Purchased Business or any part thereof is carried on by the Purchaser.

**2.2 Gencarelli Assets.** Subject to the provisions of this Agreement, Gencarelli agrees to sell, assign and transfer to the Purchaser and the Purchaser agrees to purchase from Gencarelli effective as of 12:01 A.M. on the Closing Date, the following property owned or leased by Gencarelli (collectively the "Gencarelli Assets"):

- (a) the 19 sites on Schedule 2.2(a) where the building, land and site goodwill are owned by Gencarelli;
- (b) the 6 leased sites listed on Schedule 2.2(b) between Gencarelli as tenant and third party landlords;
- (c) the leases or subleases of land or land and buildings including without limitation those listed on Schedule 2.2(c) between Gencarelli as landlord and Bess Eaton as tenant;
- (d) the leases and tenancies between Gencarelli as landlord and the third party tenants as listed, at the 3 locations listed, on Schedule 2.2(d);
- (e) all goodwill related to the assets described in Sections 2.2(a) through (d) hereof; and
- (f) the Groton property described in Section 7.16.

**2.3 Excluded Assets.** The Purchased Assets shall not include any of the following property and assets (collectively, the "Excluded Assets"):

- (a) **Cash.** All of Bess Eaton's cash on hand or in banks or other depositories as of 12:01 A.M. on the Closing Date, except as provided in Section 2.1(k);
- (b) **Related-Party Debt** All indebtedness of Gencarelli or any Affiliate of Bess Eaton, or any other person who is a related person of Bess Eaton or Gencarelli, to Bess Eaton as of 12:01 A.M. on the Closing Date;
- (c) **Income Taxes** All income tax installments paid by Bess Eaton and the right to receive any refund of income taxes paid by Bess Eaton;
- (d) **Litigation Recoveries** All choses in action, known or unknown, to the extent that they do not relate to the Purchased Assets; amounts recoverable by Bess Eaton in



respect of pending litigation which is listed on Schedule 5.24; litigation commenced by Bess Eaton subsequent to Closing but not presently contemplated; and all rights of Bess Eaton in avoidance or recovery claims arising under Chapter 5 of the Bankruptcy Code;

- (e) **Receivables** Any rebates receivable by Bess Eaton and refunds of insurance premiums if coverage is cancelled or reduced on Closing, and all insurance proceeds other than to the extent that they relate to the Purchased Assets or the Mystic fire insurance receivables;
- (f) **This Agreement** The rights created under this Agreement; and
- (g) **Excluded Assets** The assets listed in Schedule 2.3(g).

### 3. PURCHASE PRICE

**3.1 Bess Eaton Assets Purchase Price.** The purchase price payable to Bess Eaton for the Bess Eaton Assets (the "Bess Eaton Assets Purchase Price") shall, subject to adjustments pursuant to Section 3.7, be equal to the sum of (i) \$6,485,930 plus (ii) the amount necessary to be paid to cover claims for damages resulting from rejections of Excluded Leases by Bess Eaton, currently estimated to be \$126,768.

**3.2 Gencarelli Assets Purchase Price.** The purchase price payable to Gencarelli for the Gencarelli Assets (the "Gencarelli Assets Purchase Price") shall, subject to adjustments pursuant to Section 3.7 and 7.16, be equal to the sum of:

- (a) \$25,278,175, less the Deposit referenced in Section 3.4, payable on Closing; and
- (b) \$3,198,175 (exclusive of interest at 3.44% per annum) payable in installments over 5 years evidenced by a promissory note in the form of Schedule 3.2(b).

**3.3 Closing Date Payment.** At the Effective Time, the Purchaser shall pay to or to the order of:

- (a) Bess Eaton the amount of the Bess Eaton Assets Purchase Price (i) plus or minus adjustments in accordance with the statement of adjustments as defined in Section 3.7, (ii) minus the aggregate of the amount of insurance proceeds included in the Purchased Assets, to the extent (if any) that they have been paid to Bess Eaton, and (iii) minus the aggregate amount of all cure amounts for leases and executory contracts being assumed by Bess Eaton and assigned to the Purchaser to the extent not paid by Bess Eaton (such net amount being referred to as "Closing Date Payment"), by way of electronic transfer of immediately available funds to such bank account in Providence, Rhode Island as Bess Eaton may specify in such direction; and
- (b) Gencarelli on account of the Cash Portion of the Gencarelli Assets Purchase Price, the amount of \$25,278,175 (less the amount of the Deposit, and plus or minus adjustments in accordance with the statement of adjustments as defined in

Section 3.7, and minus the amount of the escrow referred to in Section 7.15 ("Store 949"), and minus the \$225,000 referred to in Section 7.16 ("Groton Site") if the Purchaser elects to exclude the Groton Property from the transaction), by way of electronic transfer of immediately available funds to such bank account in Providence, Rhode Island as Gencarelli may specify in such direction; and

- (c) the balance of the Gencarelli Assets Purchase Price shall be evidenced by a promissory note of the Purchaser in the aggregate principal amount of \$3,198,175 (exclusive of interest at 3.44% per annum with security as set out in Section 7.28).

**3.4 Deposit.** The Purchaser has previously paid to (a) Gencarelli the sum of \$25,000, and (b) the Vendor's counsel, Blish & Cavanagh LLP, in trust, which has been released to Gencarelli, a deposit in the amount of \$50,000 (such \$75,000 being referred to as the "Initial Deposit"). If the transaction of purchase and sale contemplated by this Agreement is not completed by reason of the non-fulfillment of one or more of the conditions set forth in Section 8.3, the Initial Deposit shall be retained by the Vendor together with the Additional Deposit as liquidated damages and not as a penalty and notwithstanding any other provision hereof shall be the Vendor's sole remedy for such breach. If such transaction is not completed due to breach by the Vendor, \$50,000 of the Initial Deposit shall be returned to the Purchaser.

In addition, the Purchaser has deposited in escrow with Edwards & Angell LLP in Providence, Rhode Island, an additional sum of \$425,000 (the "Additional Deposit," and together with the Initial Deposit, collectively, including any interest accrued on the Additional Deposit, the "Deposit"). If the Bidding Procedures order is entered by the Bankruptcy Court, the Additional Deposit will be paid over to and held in an interest-bearing escrow account by Edward Bertozzi of Edwards & Angell LLP and Allan Shine of Winograd, Shine and Zacks, P.C. as joint escrow agents pursuant to an escrow agreement in form and substance reasonably satisfactory to the Purchaser and the Vendor until the earlier of (i) the Closing (and if the Closing occurs, then notwithstanding any other provision hereof, the Deposit shall be applied to and credited against the Purchase Price payable by the Purchaser) or (ii) the termination of this Agreement. If this Agreement is terminated before the Closing occurs on account of a breach by the Purchaser, the Additional Deposit shall be retained by the Vendor together with the Initial Deposit as liquidated damages and not as a penalty and notwithstanding any other provision hereof shall be the Vendor's sole remedy for such breach. If this Agreement is otherwise terminated, the Additional Deposit shall be promptly remitted to the Purchaser.

**3.5 Allocation of Purchase Price.** The Vendor and the Purchaser agree to allocate the Purchase Price among the Purchased Assets in accordance with Schedule 3.5 and agree to cooperate and report the sale and purchase of the Purchased Assets for all federal, state and local tax purposes in a manner consistent with such allocation. A preliminary draft of Schedule 3.5 is attached. Once the Purchaser has obtained updated appraisal information the parties will finalize and initial the final form of Schedule 3.5 within 20 days of execution of the Agreement using the valuation methods incorporated into the preliminary draft of Schedule 3.5 and applying them to the actual value appraisals obtained by the Purchaser, failing which the initial form of Schedule 3.5 shall become the final version. The Vendor and Purchaser agree to prepare a schedule of inventories at Closing within 5 days after Closing valuing such inventory at the lower of cost or market value.

**3.6 Elections.** The Purchaser and the Vendor shall, on the Closing Date, elect on all applicable forms in accordance with the allocations in Schedule 3.5.

**3.7 Adjustments.** The Bess Eaton Assets Purchase Price or, as the case may be, the Gencarelli Assets Purchase Price shall be adjusted as provided in Sections 3.1, 3.2, 7.4, and 7.5(d). All other amounts customarily adjusted for (including collected rents paid to Bess Eaton or Gencarelli and rents paid or payable by Bess Eaton or Gencarelli, common area charges, merchants' association charges, realty taxes, capital levies, local improvement charges, special assessments, water, sewer and utility charges) relating to the Bess Eaton Assets and the Gencarelli Assets shall be apportioned as of the Closing Date, and the net amount thereof shall be added to or deducted from, the Bess Eaton Assets Purchase Price or the Gencarelli Assets Purchase Price, as the case may be, with amounts for periods commencing after the Closing Date being allocated to Purchaser. Uncollected rents due to Bess Eaton or Gencarelli as landlord shall be apportioned if and when collected. If the amount of real estate taxes applicable to a particular asset is not known as of the Closing Date such taxes shall be apportioned on the basis of the taxes assessed for the prior fiscal year, with a reapportionment as soon as the new tax rate and valuation can be ascertained; and, if the taxes which are to be apportioned shall thereafter be reduced by abatement, the amount of such abatement, less the reasonable cost of obtaining the same, shall be apportioned between the parties. Statements of Adjustment shall be prepared as of the Closing Date.

**3.8 Transfer Taxes.** The Purchaser shall be liable for and shall pay all federal and state sales taxes (including any retail sales taxes) and all other taxes, duties, fees or other like charges of any jurisdiction (except income taxes and land transfer taxes) properly payable in connection with the transfer of the Purchased Assets by the Vendor to the Purchaser to the extent that the transfer transaction is not exempt from taxation under Section 1146(c) of the Bankruptcy Code. Land transfer taxes in respect of the Purchased Assets shall be payable by the Vendor on or prior to Closing to the extent that the transfer transaction is not exempt from taxation under Section 1146(c) of the Bankruptcy Code.

#### **4. ASSUMPTION OF LIABILITIES**

**4.1 Assumption of Certain Liabilities by the Purchaser.** Subject to the provisions of this Agreement, the Purchaser agrees to assume, pay, satisfy, discharge, perform and fulfill, from and after the Effective Time, the future performance obligations and liabilities of the Vendor existing at the Effective Time, excluding any liability for past breaches (the "Assumed Liabilities") and the Purchaser shall indemnify and hold the Vendor harmless in respect of the Assumed Liabilities under:

- (a) the Contracts described in Schedule 2.1(f) which the Purchaser has indicated it is willing to assume;
- (b) the licenses, permits, approvals, consents, registrations, certificates and other authorizations described in Schedules 5.17, 5.18A and 5.18B which the Purchaser indicates, prior to Closing it is willing to assume; and
- (c) all leases assumed by Vendor and assigned by Vendor to the Purchaser.

but specifically not including the Excluded Liabilities.

**4.2 Excluded Liabilities.** There shall be excluded from the Assumed Liabilities all liabilities of the Vendor not expressly assumed by the Purchaser under Section 4.1, together with any of the following liabilities, whether or not they are referred to in Section 4.1:

- (a) the liabilities of the Vendor created by this Agreement;
- (b) indebtedness of the Vendor to any person with whom the Vendor or the Shareholder is a related person;
- (c) liabilities of the Vendor for income taxes under the *Internal Revenue Code* and federal, state, county or municipal statutes imposing a tax on income, sales, use or other taxes required to be collected or remitted by the Vendor, owing or accruing prior to the Effective Time;
- (d) liabilities of the Vendor under Environmental Laws;
- (e) liabilities of the Vendor under any court, administrative, regulatory or similar proceeding (whether civil, quasi-criminal or criminal), arbitration or other dispute resolution procedure, investigation or inquiry by any governmental, administrative, regulatory or similar body, or any similar matter or proceeding (collectively, "Proceedings");
- (f) claims in respect of any breach of or termination or obligations under any Contract to which the Vendor is a party or by which it may be bound occurring prior to the Closing Date;
- (g) indebtedness of the Vendor for borrowed money;
- (h) warranties or continuing obligations to any purchaser of any product sold by Bess Eaton and delivered or provided prior to the Closing Date;
- (i) liabilities under any Contract for which any consent is required and not obtained, notwithstanding any waiver by the Purchaser of its rights under Article 9 hereof with respect to such consent;
- (j) liabilities in respect of any business or assets retained by the Vendor;
- (k) liabilities under any agreement or in respect of any asset included in the Excluded Assets;
- (l) any liability of Bess Eaton to Westerly Hospital pursuant to a pledge in the original amount of \$200,000;

- (m) liabilities owed by Bess Eaton to Gencarelli under leases or in respect of other obligations;
- (n) two Mercedes vehicles leased by Gencarelli;
- (o) any liability under any Contracts not expressly assumed; and
- (p) any accruals for unpaid vacation pay, premiums for employment insurance, health premiums, social security premiums, accrued wages, salaries and commissions and employee benefit plan payments, relating to periods before the Closing Date.

(collectively, the "Excluded Liabilities"), all of which shall remain obligations of the Vendor.

**4.3 Indemnification for Excluded Liabilities.** The Purchaser shall not assume, and Bess Eaton and Gencarelli covenant that they shall be solely responsible for the Excluded Liabilities and shall indemnify and hold the Purchaser harmless in respect thereof.

## **5. REPRESENTATIONS AND WARRANTIES OF BESS EATON AND GENCARELLI**

Bess Eaton and Gencarelli, and each of them jointly and severally, represent and warrant to the Purchaser as follows and acknowledge that the Purchaser is relying on such representations and warranties in connection with its purchase of the Purchased Assets:

**5.1 Organization and Status.** Bess Eaton is validly existing in good standing under the laws of its jurisdiction of incorporation. Bess Eaton is duly registered, licensed or qualified to carry on business as a foreign corporation under the laws of the jurisdictions set out in Schedule 5.1, being the only jurisdictions in which the nature of the Purchased Business or the Purchased Assets or any of them makes such registration, licensing or qualification necessary. Bess Eaton does not have any subsidiaries or hold any shares or other equity interest in any other person and except for the claims alleged by George Cioe, all of the capital stock of Bess Eaton is owned legally and beneficially by Gencarelli.

**5.2 Corporate Power and Authorization.** Bess Eaton has the corporate power and capacity to enter into this Agreement and to perform its obligations hereunder, to own or lease its property and to carry on the Purchased Business as now being conducted by it. This Agreement has been duly authorized by Bess Eaton. Each of the agreements, contracts and instruments required by this Agreement to be delivered by Bess Eaton at the Effective Time has been duly authorized by Bess Eaton. This Agreement has been duly executed and delivered by Bess Eaton and is a legal, valid and binding obligation of Bess Eaton, enforceable against Bess Eaton by the Purchaser in accordance with its terms before commencement of the Bankruptcy Case and, after commencement of the Bankruptcy Case and entry of the Approval Order, will be enforceable against Bess Eaton by the Purchaser in accordance with its terms. After the entry of the Approval Order and at the Effective Time, each of the agreements, contracts and instruments required by this Agreement to be delivered by Bess Eaton will be duly executed and delivered by Bess Eaton and will be valid and binding obligations of Bess Eaton or Gencarelli, enforceable in accordance with their respective terms.

**5.3 No Other Agreements to Purchase.** No person other than the Purchaser has any written or oral agreement or option or any right or privilege (whether by law, pre-emptive or contractual) capable of becoming an agreement or option for the purchase or acquisition from Bess Eaton or Gencarelli of any of the Purchased Assets, other than pursuant to purchase orders accepted by Bess Eaton in the ordinary course of business.

**5.4 No Violation.** The execution and delivery of this Agreement by Bess Eaton and Gencarelli, and subject to the entry of the Approval Order, the consummation of the transactions, herein provided for will not result in the breach or violation of any of the provisions of, or constitute a default under, or conflict with or cause the acceleration of any obligation of Bess Eaton or Gencarelli under:

- (i) any provision of the constating documents or by-laws or resolutions of the board of directors (or any committee thereof) or shareholders of Bess Eaton;
- (iii) any judgment, decree, order or award of any court, governmental body or arbitrator having jurisdiction over Bess Eaton or Gencarelli;
- (iv) any license, permit, approval, consent or authorization held by Bess Eaton or Gencarelli or necessary to the operation of the Purchased Business; or
- (v) any applicable law, statute, ordinance, regulation or rule.

**5.5 Sufficiency of Purchased Assets.** The Purchased Assets are substantially all of the assets used by the Vendor to carry on the Purchased Business, in the ordinary course of business consistent with past practice. Except for the Excluded Assets, the Purchased Assets constitute substantially all of the assets used or held by Bess Eaton in the operation of the Purchased Business. Except for the fire at the Mystic location, during the two years preceding the date of this Agreement, there has not been any material interruption of operations (being an interruption of more than one day) of the Purchased Business due to inadequate maintenance of any of the Purchased Assets. With the exception of inventory in transit, all the Purchased Assets are situate at the locations set out in Schedule 5.5.

**5.6 Title to Personal Property.** Bess Eaton is the absolute beneficial owner of the Bess Eaton Assets (other than the Leased Property) and has good and valid title thereto, free and clear of all Encumbrances other than Permitted Encumbrances and other than Uniform Commercial Code filings in respect of which (a) the obligations are specially assumed under Schedule 2.1(f) or (b) the obligations will be paid out in full on or before Closing. Bess Eaton has the exclusive right to possess, use, occupy and dispose of the Bess Eaton Assets, subject only to the rights of the other parties to the Contracts listed in any Schedule to this Agreement. Subject to the entry of the Approval Order, at the Effective Time, Bess Eaton will have full legal right, power and authority to sell, assign and transfer the Bess Eaton Assets to the Purchaser free of all Encumbrances, other than Permitted Encumbrances.

**5.8 Location of Real Property.** Schedules 2.1(a), 2.2(a) and 2.2(b) sets forth the municipal addresses and complete and accurate legal descriptions of all the Leased Property and the Gencarelli Assets.

**5.9 Title to Real Property.** Except for the rights of tenants under the leases listed in Schedules 2.2(c) and 2.2(d), Gencarelli has the exclusive right to possess, use and occupy and has good and marketable title in fee simple to all the owned Gencarelli Assets. On the Closing Date, the Gencarelli Assets shall be conveyed to the Purchaser free and clear of all Encumbrances other than Permitted Encumbrances. Except as disclosed in Schedule 5.9, with respect to all buildings, structures, improvements and appurtenances situated on the Leased Property or the Gencarelli Assets, the respective Vendor has adequate rights of ingress and egress for the operation of the Purchased Business in the ordinary course of business. None of such buildings, structures, improvements or appurtenances (or any equipment therein), nor the operation or maintenance thereof, violates any restrictive covenant or any provision of any federal, state or municipal law, ordinance, rule or regulation, or to the knowledge of the Individual Vendor encroaches on any property owned by others. Without limiting the generality of the foregoing:

- (a) the Leased Property, the Gencarelli Assets, the current uses thereof and the conduct of the Purchased Business comply with all applicable regulations, statutes, enactments, laws and by-laws, codes, standards and agreements enacted or administered by, or entered into with, any governmental or other authority having jurisdiction including, without limitation, those dealing with zoning, parking, access, loading facilities, landscaped areas, building construction, septic systems, wells, fire and public health and safety and Environmental Laws or constitute legal non conforming uses which the Purchaser may lawfully continue;
- (b) no alteration, repair, improvement or other work has been ordered, directed or requested in writing to be done or performed to or in respect of the Leased Property, the Gencarelli Assets, or to any of the plumbing, heating, elevating, water, drainage or electrical systems, fixtures or works by any municipal, state, or other competent authority, board of fire insurance underwriters or anyone else having the right or purporting to have the right to require such work to be completed, which alteration, repair, improvement or other work has not been completed or will not be completed by the Closing Date, and neither Bess Eaton nor Gencarelli has been given any written notification of any such outstanding work, deficiency notice or other written notice being ordered, directed or requested, advising of any breach of any by-law, code, regulation or standard or suggesting that any repair or work is necessary to the Leased Property or the Gencarelli Assets or any part thereof other than those which have been complied with and such systems, fixtures or works have been inspected, approved and licensed where required;
- (c) all accounts for work and services performed and materials placed or furnished upon or in respect of the Leased Property, or the Gencarelli Assets at the request of either Vendor have been fully paid and satisfied, and no person is entitled to claim a lien under the construction lien, mechanics lien, or similar legislation in any state where Purchased Assets are located against the Leased Property, or the Gencarelli Assets or any part thereof, other than current accounts in respect of which the payment due date has not yet passed, and neither Vendor has failed to withhold the full amount of all holdbacks required to be withheld under the

construction lien legislation in any state where Purchased Assets are located in respect of amounts due under any contract for work or services performed or materials placed or furnished upon or in respect of the Leased Property or the Gencarelli Assets;

- (d) except for amounts listed on Schedule 5.9 which are to be paid on Closing by direction of a portion of the Purchase Price there is nothing owing in respect of the Leased Property or the Gencarelli Assets by either Vendor to any municipal corporation or to any other corporation or commission owning or operating a public utility for water, gas, electrical power or energy, steam or hot water, or for the use thereof, other than current accounts in respect of which the payment due date has not yet passed;
- (e) no part of the Leased Property or the Gencarelli Assets has been taken or expropriated by any federal, state, municipal or other competent authority, nor has any notice or proceeding in respect thereof been given or commenced;
- (f) the Leases of Real Property constitute all of the leases which affect title to the Leased Property or the Gencarelli Assets;
- (g) except as disclosed in Schedule 5.9, and except with respect to the Store 949 (Mystic) location being rebuilt as described in Section 7.15, none of the Leased Property or the Gencarelli Assets is currently undergoing any alteration or renovation nor is any such alteration or renovation contemplated;
- (h) all municipal and private utility services including, without limitation, water, storm sewers, sanitary sewers, septic systems, wells, electricity, roads, sidewalks and street lights have been fully installed and paid for and that there are not outstanding against the Vendor's interest in the Leased Property or the Gencarelli Assets any present or future capital levies (except those to be adjusted for at Closing), sewer impost fees, local improvement rates, special assessments, deferred or installment charges of a capital nature or any other similar charges, and neither Vendor is aware of any likelihood that any of the foregoing may become outstanding in the future; and
- (i) the present means of ingress and egress to and from the Leased Property and the Gencarelli Assets permit the existing use thereof and comply with all applicable laws, by-laws, regulations, codes, standards and agreements enacted or administered by, or entered into with, any governmental or other authority having jurisdiction.

#### **5.10 Real Property Leases.**

- (a) Bess Eaton is not a party to any lease or agreement to lease in respect of any real property, whether as lessor or lessee, other than (i) the Leases of Real Property described in Schedule 2.1(a) relating to the Leased Property and (ii) the Excluded Leases. Schedule 2.1(a) sets out a list of all of Leases of Real Property, including all amendments thereto, true and complete copies of all of which have been



delivered to the Purchaser. In respect of the lease of Store 944, Post Road, North Kingston, the Vendor is not indebted to the landlord for construction costs or otherwise aside from rents shown on Schedule 2.1(a). The Vendor has provided a true and complete copy of each of the Leases of Real Property and all amendments thereto to the Purchaser. Except as described in Schedule 2.1(a), Bess Eaton occupies the Leased Property and has the exclusive right to occupy and use the Leased Property. Bess Eaton has the right of quiet possession and non-disturbance against any Encumbrance on the Leased Property and any holder of such Encumbrance. Each of the Leases of Real Property is in good standing and in full force and effect, free and clear of any Encumbrances, and neither the Vendor nor any other party thereto is in breach of any covenants, conditions or obligations contained therein or has received or given notice alleging such breach with the possible exception of (i) realty taxes payable by Vendor being in arrears, which are to be paid on Closing by direction of a portion of the Purchase Price, and (ii) lease payments from Bess Eaton to Gencarelli which may not be current between the date hereof and Closing and will either be paid up to date at Closing or will be acknowledged by Gencarelli to be an obligation of Bess Eaton to Gencarelli which is an Excluded Liability. Bess Eaton is not obligated to pay any leasing or brokerage commission relating to any Lease of Real Property and has no enforceable obligation to pay any leasing or brokerage commission upon the renewal of any Lease of Real Property. No material construction, alteration or other leasehold improvement work with respect to any Lease of Real Property remains to be paid or to be performed by Bess Eaton. There are not at the present time any disputes between Bess Eaton and any other party relating to provisions of any Lease of Real Property, the state of repair of the premises demised thereunder, the payment of rent, the calculation or payment of operating costs or realty taxes or payments or anything else;

- (b) Gencarelli is not a party to any lease or agreement to lease in respect of any real property used in the Purchased Business, whether as lessor or lessee, other than the leases of real property described in Schedules 2.2(b), 2.2(c) and 2.2(d). Schedules 2.2(b), 2.2(c) and 2.2(d) set out a list of all of the leases which form part of the Gencarelli Assets (the "Gencarelli Leases"). The Vendor has provided a true and complete copy of each of the Gencarelli Leases and all amendments thereto to the Purchaser. Except as described in Schedules 2.2(b), 2.2(c) or 2.2(d), Bess Eaton occupies the property leased under the Gencarelli Leases and has the exclusive right to occupy and use the property leased under the Gencarelli Leases. Gencarelli has the right of quiet possession and non-disturbance against any Encumbrance on the property leased under the Gencarelli Leases and any holder of such Encumbrance. Each of the Gencarelli Leases is in good standing and in full force and effect, free and clear of any Encumbrances, and neither the Vendor nor any other party thereto is in breach of any covenants, conditions or obligations contained therein or has received or given notice alleging such breach with the possible exception of (i) realty taxes payable by Vendor being in arrears, which are to be paid on Closing by direction of a portion of the Purchase Price, and (ii) lease payments from Bess Eaton to Gencarelli which may not be current between the date hereof and Closing and will either be paid up to date at Closing

or will be acknowledged by Gencarelli to be an obligation of Bess Eaton to Gencarelli which is an Excluded Liability. Vendor is not obligated to pay any leasing or brokerage commission relating to any lease of property leased under the Gencarelli Leases and has no enforceable obligation to pay any leasing or brokerage commission upon the renewal of any lease of property leased under the Gencarelli Leases. No material construction, alteration or other leasehold improvement work with respect to any lease of property leased under the Gencarelli Leases remains to be paid or to be performed by Vendor. There are not at the present time any disputes between Vendor and any other party relating to provisions of any lease of property leased under the Gencarelli Leases, the state of repair of the premises demised thereunder, the payment of rent, the calculation or payment of operating costs or realty taxes or payments or anything else.

**5.11 Inventories.** The inventories of Bess Eaton are at customary levels, do not include any material items which are slow moving, below standard quality or of a quality or quantity not useable or saleable in the ordinary course of business, the value of which has not been written down on its books of account to net realizable market value. The inventory levels of Bess Eaton have been maintained at such amounts as are required for the operation of the Purchased Business as previously conducted and such inventory levels are adequate therefor.

**5.12 Intellectual Property.** Schedule 2.1(h) sets out all of the Intellectual Property (including particulars and status of registration or application for registration) and all licenses, and other Contracts which comprise or relate to Intellectual Property. The Intellectual Property comprises all trade or brand names, business names, domain names, trade-marks, service marks, copyrights, patents, industrial designs, trade secrets, know-how, computer software, inventions, designs and other industrial or intellectual property sufficient to conduct the Purchased Business and constitute all the Intellectual Property owned by or in which Vendor has any interest. To the extent any Intellectual Property owned by the Vendor is omitted from Schedule 2.1(h) the Vendor will following Closing sign any documents reasonably requested to convey to Purchaser title to such omitted Intellectual Property. Bess Eaton is the legal and beneficial owner of the Intellectual Property, free and clear of all Encumbrances (except for the Intellectual Property listed in Schedule 2.1(h) which is identified as being licensed to Bess Eaton), and is not a party to or bound by any Contract or any other obligation whatsoever that limits or impairs its ability to sell, transfer, assign or convey, or that otherwise affects, the Intellectual Property. No person has been granted any interest in or right to use all or any portion of the Intellectual Property, except as set out in Schedule 2.1(h) and to the knowledge of Vendor there is no other person operating under or in conjunction with the name Bess Eaton other than the Bess Eaton Foundation. The conduct of the Purchased Business does not infringe upon the industrial or intellectual property rights, domestic or foreign, of any other person. To the knowledge of Bess Eaton and Gencarelli, there are no outstanding claims of any infringement or breach by Bess Eaton or the Purchased Business of any industrial or intellectual property rights of any other person, and neither Bess Eaton nor Gencarelli has received any notice that the conduct of the Purchased Business, including the use of the Intellectual Property, infringes upon or breaches any industrial or intellectual property rights of any other person, or the trade secrets, know-how or confidential or proprietary information of any other person, and to the knowledge of Bess Eaton and Gencarelli, there has been no infringement or violation of any of Bess Eaton's rights in the Intellectual Property by any other person. To the knowledge of Bess Eaton and Gencarelli,

there exists no state of facts which casts doubt on the validity or enforceability of any of the Intellectual Property. Bess Eaton has provided to the Purchaser a true and complete copy of all Contracts and amendments thereto which comprise or relate to the Intellectual Property.

**5.13 Insurance.** Each of Bess Eaton and Gencarelli has all their respective fixed assets included in the Purchased Assets insured against loss or damage by all insurable hazards or risks on a replacement cost basis and such insurance coverage will be continued in full force and effect to and including the Effective Time. Schedule 5.13 sets out all insurance policies (specifying the insurer, the amount of the coverage, the type of insurance, the policy number and any pending claims thereunder all of which claims are covered by insurance subject to applicable deductibles) maintained by each of Bess Eaton and Gencarelli on the Purchased Assets or personnel as of the date hereof and true and complete copies of the most recent inspection reports, if any, received from insurance underwriters or others as to the condition of the Purchased Assets. Vendor agrees to provide Purchaser with insurer's confirmation of coverage for all claims listed in Schedule 5.24 on or before Closing. Vendor also agrees to provide to Purchaser on or before Closing the Vendor's claims history over the previous 3 years in the form of a written summary provided by its insurer or its broker. The Vendor's liability insurance is occurrence based (and will provide coverage for any claims which may arise prior to Closing even though not made until after Closing) with coverage limits of \$5 million per occurrence and \$5 million coverage in aggregate of which at least \$4.5 million of aggregate coverage remains available. Neither Bess Eaton nor Gencarelli is in default with respect to any of the provisions contained in any such insurance policy and neither has failed to give any notice or present any claim under any such insurance policy in a due and timely fashion. The Vendor shall on request of the Purchaser provide proof that such insurance continues to be in place and the Purchaser may, if required to prevent lapse of such insurance, pay any outstanding premiums and deduct such amounts from the Purchase Price otherwise payable. The Vendor has provided a true copy of each insurance policy referred to in Schedule 5.13 to the Purchaser.

**5.14 No Expropriation.** No part of the Purchased Assets has been taken or expropriated by any federal, state, municipal or other authority, nor has any notice or proceeding in respect thereof been given or commenced, and to the knowledge of Bess Eaton and Gencarelli, there exists no intent or proposal to give any such notice or commence any such proceedings.

**5.15 Agreements and Commitments.** Except as disclosed in Schedules 2.1(a), 2.1(c), 2.1(f), 2.1(h), 2.1(i), 2.2(b), 2.2(c), 2.2(d), and 5.15 to this Agreement, neither Bess Eaton nor Gencarelli is a party to or bound by any:

- (a) any collective bargaining agreement or other Contract with any labor union;
- (b) any employment or consulting Contract or any other Contract with any officer, employee, agent or consultant, other than oral Contracts of indefinite hire on an at will basis terminable without cause on reasonable notice;
- (c) except as asserted in the litigation by George Cioe, any profit sharing, bonus, stock option, pension, retirement, disability, stock purchase, medical, dental, hospitalization, insurance or similar plan or agreement providing benefits to any current or former director, officer, employee or consultant;

- (d) any profit or revenue sharing agreement;
- (e) any license, franchise, royalty or other agreement which relates in whole or in part to any intellectual property.

The Vendor has provided to the Purchaser a true and complete copy of each Contract listed or described on Schedules 2.1(a), 2.1(c), 2.1(f), 2.1(h), 2.1(i), 2.2(b), 2.2(c), 2.2(d), and 5.15 to this Agreement, including all amendments thereto.

**5.16 Compliance with Laws.** The Vendor is in compliance with all applicable laws, regulations, by-laws, ordinances, regulations, rules, judgments, decrees and orders of each jurisdiction in which the Purchased Business is carried on or any of the Purchased Assets are situated.

**5.17 Licenses.** Schedule 5.17 sets out a complete and accurate list of all licenses, permits, approvals, consents, certificates, registrations and authorizations (whether governmental, regulatory or otherwise) (the "Licenses") held by or granted to Bess Eaton, and Vendor does not represent that all such Licenses are assignable, and there are no other licenses, permits, approvals, consents, certificates, registrations or authorizations necessary to carry on the Purchased Business or to own or lease any of the Purchased Assets. Each License is valid, subsisting and, other than Licenses renewable annually all of which have been applied for and in respect of which Vendor knows of no reason why they would not be renewed, in good standing and Bess Eaton is not in default or breach of any License and, to the knowledge of Bess Eaton and Gencarelli, no proceeding is pending or threatened to revoke or limit any License. The Vendor has provided a true and complete copy of each License and all amendments thereto to the Purchaser.

**5.18 Consents and Approvals.** Except for the Approval Order and the consents and approvals set out in Schedules 5.18A and 5.18B, no authorization, consent or approval of, or filing with or notice to or under:

- (a) any governmental agency, regulatory body or court; or
- (b) any law, statute, ordinance, regulation or rule;

is required in connection with the execution, delivery and performance of this Agreement by Bess Eaton and Gencarelli or the sale and assignment of any of the Purchased Assets hereunder.

**5.19 Financial Statements and Information.** Except as set out in Schedule 5.19 with respect to the Interim Financial Statements, the Financial Statements have been prepared in accordance with generally accepted accounting principles applied on a basis consistent with prior periods, are correct and complete and present fairly the assets, liabilities (whether accrued, absolute, contingent or otherwise) and financial condition of Bess Eaton as at the respective dates of the Financial Statements and the sales, earnings and results of operations of Bess Eaton for the respective periods covered by the Financial Statements. Except as shown on the Financial Statements Bess Eaton has no liabilities of any kind (including contingent or unliquidated liabilities) regardless of whether generally accepted accounting principles would require them to be disclosed on or reflected on the Financial Statements. Bess Eaton has provided true and

complete copies of the Financial Statements to the Purchaser. The information with respect to Bess Eaton's sales and revenues that has been or will be provided by the Vendor to the Purchaser has been or will be true and accurate in all material respects.

**5.20 Books and Records.** The books and records of Bess Eaton are currently being maintained in accordance with good bookkeeping practice and fairly and correctly set out and disclose, in accordance with generally accepted accounting principles, the financial position of Bess Eaton as at the date hereof, and all financial transactions of Bess Eaton are now accurately recorded in such books and records.

**5.21 Absence of Changes.** Except as set out in Schedule 1.7 or Schedule 5.21, since the Financial Statement Date the Purchased Business has been carried on only in the ordinary course of business consistent with past practice and there has not been:

- (a) any material damage, destruction or loss (whether or not covered by insurance) affecting the Purchased Assets;
- (b) any obligation or liability (whether absolute, accrued, contingent or otherwise, and whether due or to become due) incurred by Bess Eaton, other than those incurred in the ordinary course of business or as disclosed in any Contract listed in any Schedule hereto;
- (c) excluding the George Cioe litigation, any labor trouble adversely affecting the Purchased Business or the Purchased Assets;
- (d) any license, sale, assignment, transfer or disposition of any Purchased Assets, other than sales of inventory to customers in the ordinary course of business;
- (e) any write-down of the value of any inventory in amounts exceeding \$10,000 in each instance or \$20,000 in the aggregate;
- (f) any general increase in the compensation of the employees of Bess Eaton including, without limitation, any increase pursuant to any Employee Plan or commitment;
- (g) any increase in any compensation or bonus (including, without limitation, any increase pursuant to any Employee Plan or commitment) payable to any officer, employee, consultant or agent of Bess Eaton since the Financial Statement Date, or the execution of any employment contract with any officer or employee, or the making of any loan to, or engagement in any transaction with, any employee, officer or director of Bess Eaton;
- (h) any capital expenditures or commitments relating to the Purchased Business or Purchased Assets in excess of \$25,000 in the aggregate;
- (i) any forward purchase commitments in excess of the requirements of the Purchased Business for normal operating inventories or at prices higher than the current market prices;

- (j) any forward sales commitments other than in the ordinary course of business or any failure to satisfy any accepted order for goods or services;
- (k) any change in the accounting or tax practices followed by Bess Eaton;
- (l) any change adopted by Bess Eaton in its depreciation or amortization policies or rates;
- (m) authorized or agreed or otherwise become committed to do any of the foregoing.

#### **5.22 Related Party Transactions.**

Other than as asserted in the George Cioe litigation and except as disclosed on Schedule 5.22 no officer, director or shareholder (or any person who is a related person to any of the foregoing) of Bess Eaton:

- (a) owns, directly or indirectly, any interest in (except for shares representing less than one per cent of the outstanding shares of any class or series of any publicly traded company), or is an officer, director, employee or consultant of, any person which is, or is engaged in business as, a competitor of Bess Eaton or the Purchased Business or a lessor, lessee, supplier, distributor, sales agent or customer of Bess Eaton or the Purchased Business;
- (b) owns, directly or indirectly, in whole or in part, any property that Bess Eaton uses in the operations of the Purchased Business; or
- (c) has a right to receive any payments from suppliers or customers of Bess Eaton or the Purchased Business based directly or indirectly on sales, revenues or profits of the Purchased Business.

**5.23 Taxes.** To the best of the Vendor's knowledge, Bess Eaton has duly completed and filed on a timely basis all tax returns required to be filed by it and has paid all taxes which are due and payable, and all assessments, reassessments, governmental charges, penalties, interest and fines due and payable by it (other than amounts for realty taxes payable in respect of the Leased Property or the Gencarelli Assets, all of which will be paid up to date on Closing). Bess Eaton has made adequate provision in the Financial Statements for taxes payable by it for the current period and any previous period for which tax returns are not yet required to be filed. There are no actions, suits, proceedings, investigations or claims pending or, to the knowledge of Bess Eaton and Gencarelli, threatened against Bess Eaton in respect of taxes, governmental charges or assessments, nor are any material matters under discussion with any governmental authority relating to taxes, governmental charges or assessments asserted by any such authority. Bess Eaton has withheld from each payment made to any of its past or present employees, officers or directors, and to any non-resident of the United States, the amount of all taxes and other deductions required to be withheld therefrom, and has paid the same to the proper tax or other receiving officers within the time required under any applicable legislation. Bess Eaton has remitted to the appropriate tax authority, when required by law to do so, all amounts collected by it on account of all applicable sales or use taxes.

**5.24 Litigation and Other Proceedings.** Except as described in Schedule 5.24, and except for the commencement of the Bankruptcy Cases, there are no Proceedings against or involving Bess Eaton or Gencarelli (whether in progress or threatened), including without limitation proceedings in respect of any actual or alleged injury to any employee or other person under workers' compensation or other laws, and all of such Proceedings are fully covered by the insurance policies listed in Schedule 5.13 except as otherwise indicated therein. No event (including without limitation any actual or alleged injury to any employee or other person) has occurred which might give rise to any Proceedings, other than the commencement of the Bankruptcy Case and the prospective allowance of claims in the Bankruptcy Case, and there is no judgment, decree, injunction, rule, award or order of any court, government department, board, commission, agency, arbitrator or similar body outstanding against Bess Eaton other than the prospective allowance of claims in the Bankruptcy Case.

**5.25 Environmental.**

- (a) Except as described in Schedule 5.25, Bess Eaton, the Leased Property, the Gencarelli Assets and all operations thereon have been and are in compliance with all applicable Environmental Laws;
- (b) Bess Eaton and Gencarelli, respectively, has all licenses, permits, approvals, consents, certificates, registrations and other authorizations required under Environmental Laws (the "Environmental Permits") for the operation of the Purchased Business and the Gencarelli Assets, all of which are described in Schedule 5.17.
- (c) Each Environmental Permit is valid, subsisting and in good standing, and the Vendor is not in default or breach of any Environmental Permit, and no proceeding is pending or threatened and no grounds exist to revoke or limit any Environmental Permit;
- (d) The Vendor has not used or permitted to be used, except in compliance with all Environmental Laws, any of its properties (including the Leased Property and the Gencarelli Assets) or facilities or any property or facility which it previously owned or leased, to generate, manufacture, process, distribute, use, treat, store, dispose of, transport or handle any Hazardous Substance;
- (e) Other than the underground storage tank on site 928 Pawtucket which has been removed and in respect of which a "no further action letter" has been issued by Rhode Island, Department of Environmental Management, no underground storage tanks are or have been located on the Leased Property or the Gencarelli Assets, all buildings and other structures located on the Leased Property and the Gencarelli Assets are not now and have never been insulated with urea formaldehyde foam insulation, and such buildings or structures contain no aluminum wiring, PCBs, friable asbestos or other substance containing asbestos;
- (f) Neither Bess Eaton nor Gencarelli has ever received any notice of non-compliance, or been prosecuted for non-compliance, with any Environmental

Laws, nor has either Vendor settled any allegation of non-compliance prior to prosecution; in either case, relating to the Purchased Assets;

- (g) There are no notices, orders or directions relating to environmental matters requiring, or notifying either Vendor that it is or may be responsible for, any containment, clean-up, remediation or corrective action or any work, repairs, construction or capital expenditures to be made under Environmental Laws;
- (h) Neither Vendor has caused or permitted, nor has there been any, release, emission, spill or discharge, in any manner whatsoever, of any Hazardous Substance on, in, from or in connection with any of the Purchased Assets (including the Leased Property and the Gencarelli Assets) nor their use, nor to the knowledge of the Vendor around any of the Purchased Assets, nor has there been any such release on or from a facility which it previously owned or leased, nor any such release on or from a facility owned or operated by any third party but with respect to which either Vendor is or may reasonably be alleged to have liability;
- (i) All Hazardous Substances and all other wastes and other materials and substances used in whole or in part by either Vendor or resulting from the Purchased Business have been disposed of, treated and stored by the Vendor in compliance with all Environmental Laws;
- (j) The Vendor has delivered to the Purchaser true and complete copies of all environmental audits, evaluations, assessments, studies, tests and correspondence with Governmental Authorities relating to the Purchased Business, the Purchased Assets, the Leased Property or the Gencarelli Assets and their use which are or with reasonable effort could be within the possession or control of the Vendor (with such reasonable effort not requiring Vendor to request copies from Governmental Authorities or third party landlords); and
- (k) none of the Leased Property or Gencarelli Assets is subject to any applicable environmental cleanup responsibility law or environmental restrictive transfer law or regulation (including, without limitation, the Connecticut Transfer Act, Conn. Gen. Stat. § 22a-134 et seq.), by virtue of the transactions set forth herein and contemplated hereby.

**5.26 Product Warranties.** There are no express, written warranties given to purchasers of products supplied or services provided by Bess Eaton or the Purchased Business.

**5.28 Employee Plans.** Schedule 5.28 identifies each retirement, pension, bonus, stock purchase, profit sharing, stock option, deferred compensation, severance or termination pay, insurance, medical, hospital, dental, vision care, drug, sick leave, disability, salary continuation, legal benefits, unemployment benefits, vacation, incentive or other compensation plan or arrangement or other employee benefit which is maintained, or otherwise contributed to or required to be contributed to, by Bess Eaton for the benefit of employees or former employees of Bess Eaton (the "Employee Plans"), whether oral or written. The Employee Plans are the only



benefit plans existing in respect of Employees. True, correct and complete copies of all written Employee Plans have been provided to the Purchaser. The Employee Plans are duly registered where required by, and are in good standing under, all applicable laws and all applicable regulations and policies thereunder. All required employer and employee contributions relating to the Employees under the Employee Plans have been made, the respective fund or funds established under the Employee Plans are funded in accordance with applicable laws and the rules of the Employee Plans and no past service funding liabilities relating to the Employees exist thereunder. The Vendor on January 7, 2004 gave written notice of termination to Marketplace Ministries in respect of its contract for chaplain services and such agreement is terminated effective April 6, 2004.

**5.29 Collective Agreements.** Bess Eaton has not made any Contracts with any labor union or employee association nor made commitments to or conducted negotiations with any labor union or employee association with respect to any future agreements and, except as set out in Schedule 5.29A, to the knowledge of Bess Eaton and Gencarelli, there exist no current attempts to organize or establish any labor union or employee association with respect to any Employees of Bess Eaton nor is there any certification of any such union with regard to a bargaining unit. Schedule 5.29B describes all work stoppages and strikes (legal or otherwise) that the Purchased Business has experienced in the past five years, including the dates and length of each such occurrence.

**5.30 Employees.** Schedule 5.30A lists all Bess Eaton head office employees, their length of hire, title or classification and rate of salary or hourly pay or commission or bonus entitlements, if any, and an expanded Schedule 5.30A will be prepared and provided within 7 days of execution of this Agreement and will contain a complete and accurate list of the names of all individuals who are full-time, part-time or casual employees or individuals engaged on contract to provide employment services or sales or other agents or representatives of Bess Eaton (the "Employees") as of the date of this Agreement (other than the Excluded Employees) specifying the length of hire, title or classification and rate of salary or hourly pay and commission or bonus entitlements (if any) for each such Employee and an updated list with the same information will be provided on Closing. Schedule 5.30B lists all Employees on Schedule 5.30A, including those on lay-off but other than those in receipt of benefits under applicable workers' compensation legislation, who have been absent continually from work for a period in excess of one month, as well as the reason for their absence. Except as described in Schedule 5.30C, there are no complaints, grievances, claims, work orders, investigations or charges outstanding, or to the knowledge of Bess Eaton and Gencarelli, anticipated, nor are there any orders, decisions, directions or convictions currently registered or outstanding by any tribunal or agency against or in respect of Bess Eaton under or in respect of any employment legislation. Schedule 5.30D lists all Employees in respect of whom Bess Eaton has been advised by the applicable workers' compensation authority that such Employees are in receipt of benefits under the workers' compensation legislation. Bess Eaton is in compliance with all applicable employment legislation and, without limiting the generality of the foregoing:

- (a) there are no appeals pending before a Workers' Compensation Tribunal involving Bess Eaton except as disclosed on Schedule 5.24;

- (b) all levies, assessments and penalties made against Bess Eaton pursuant to applicable workers' compensation have been paid by Bess Eaton;
- (c) Bess Eaton is currently in Rate Group 1.0 for workers' compensation purposes;
- (d) there has been no change in the rating assessment applicable to Bess Eaton or the Purchased Business under applicable workers' compensation legislation during the past five years, except as described in Schedule 5.30E;
- (e) to the knowledge of Bess Eaton and Gencarelli, there is no audit currently being performed by any applicable workers' compensation authority; and
- (f) all payments required to be made in respect of termination and/or severance pay in respect of Employees have been made.

Except as described in Schedule 5.30F, to the knowledge of Bess Eaton and Gencarelli, no present or former employee of Bess Eaton has any claim against Bess Eaton (whether under federal or state law, under an employment agreement or otherwise) on account of or for:

- (g) overtime pay, wages or salary for any period, other than current payroll;
- (h) vacation, time off or pay in lieu of vacation or time off, other than vacation or time off (or pay in lieu thereof) earned in respect of the current fiscal year; or
- (i) any violation of any statute, ordinance or regulation relating to minimum wage or maximum hours of work.

**5.31 Employee Accruals.** All accruals for unpaid vacation pay, premiums for employment insurance, health premiums, social security premiums, accrued wages, salaries and commissions and employee benefit plan payments have been reflected in the books and records of Bess Eaton and are Excluded Liabilities.

**5.32 No Liabilities.** There are no liabilities of Bess Eaton or Gencarelli, whether or not accrued and whether or not determined or determinable, in respect of which the Purchaser may become liable on or after the consummation of the transactions herein provided for, other than the Assumed Liabilities.

**5.33 Franchisees.** Neither Vendor has granted any franchises or had any franchisees operating a Bess Eaton store within the 10 year period prior to the date hereof other than one franchise granted by Bess Eaton to Bess Eaton of New Britain, Inc. and such franchisee has ceased to operate and has no claim against either Vendor.

**5.34 Wells and Drinking Water Supply.**

- (a) To the knowledge of the Vendor, the private drinking water supply wells that service the various Bess Eaton stores on sites owned by Gencarelli were constructed and have been maintained in accordance with all Municipal, State, and/or Federal regulations or standards to ensure that the physical integrity of the

well is not compromised and that the wellhead is protected from any on or offsite contamination sources. A copy of the well record and all permits and/or certificates of approval for wells on sites owned by Gencarelli will be provided to the Purchaser at least 10 days prior to Closing. The location of each well on a property owned by Gencarelli with a septic system relative to all parts of the septic system complies with all Municipal, State, and/or Federal regulations and standards;

- (b) The maximum and the sustainable yield of each well's aquifer (whether or not on a site owned by Gencarelli) meets the existing requirements of the Vendor;
- (c) The quality of the water from each well meets all Municipal, State, and/or Federal drinking water regulations and standards, including without limitation all applicable health-related, aesthetic, and operational criteria. All required water treatment equipment has been installed and appropriately maintained; and any required water quality monitoring and reporting has been completed to ensure that the water is in compliance with Municipal, State, and/or Federal regulations.

**5.35 Septic Systems; Soil Contamination Cleanup.** The design, function, and capacity of the septic systems on the sites owned by Gencarelli included in the Purchased Assets have been approved by the applicable Municipal or State authorities as applicable and a copy of such approval shall be provided to the Purchaser at least 10 days prior to Closing. The septic systems on the sites owned by Gencarelli have the proper approvals or permits; the tanks and leaching bed are in good repair, and if the system includes onsite "treatment" for, but not limited to, BOD, TSS, and Nitrates, this treatment portion of the septic system functions as designed to achieve any required effluent criteria. Each septic system on a site owned by Gencarelli, which includes any and all tanks/grease traps and leaching beds, is large enough for anticipated operational use and waste discharges by Vendor. Each septic system is in compliance with all Municipal and/or State requirements and there are no documented issues or orders to comply against any septic systems on a site owned by Gencarelli, including but not limited to odor complaints. The Vendor will remedy and pay for the replacement of the septic system at Store #919 in North Stonington, Connecticut, as set out in Schedule 5.25, which is estimated to cost \$25,000. If the purchase of the Purchased Assets hereunder is consummated, the Purchaser shall reimburse the Vendor for the cleanup of the contaminated soil (estimated at \$4,000) at Store #918 in Bradford, Rhode Island.

**5.36 Accuracy.** Neither this Agreement nor any document or certificate to be provided by the Bess Eaton or Gencarelli pursuant to this Agreement contains any untrue statement of a material fact or omits to state any material fact necessary to make any of the statements contained herein or therein not misleading.

**5.37 No Knowledge.** To the knowledge of Bess Eaton and Gencarelli, there exist no facts relating to the Purchased Assets which, if known to the Purchaser, might reasonably be expected to deter the Purchaser, using reasonable commercial judgment, from completing the transactions herein contemplated.

## **6. REPRESENTATIONS AND WARRANTIES OF THE PURCHASER**

The Purchaser represents and warrants to the Vendor as follows and acknowledges and confirms that the Vendor is relying on such representations and warranties in connection with its sale of the Purchased Assets:

**6.1 Organization.** Tim Donut is validly existing in good standing under the laws of its jurisdiction of incorporation. Tim Donut is duly registered, licensed or qualified to carry on business as a foreign corporation under the laws of the jurisdictions set out in Schedule 6.1, being the only jurisdictions in which the nature of its business makes such registration, licensing or qualification necessary.

**6.2 Corporate Power and Authorization.** The Purchaser has the corporate power and capacity to enter into this Agreement and to perform its obligations hereunder. This Agreement has been duly authorized by the Purchaser. Each of the agreements, contract and instruments required by this Agreement to be delivered by the Purchaser at the Effective Time has been duly authorized by the Purchaser. This Agreement has been duly executed and delivered by the Purchaser and is a legal, valid and binding obligation of the Purchaser, enforceable against the Purchaser by the Vendor in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally and except that equitable remedies may only be granted in the discretion of a court of competent jurisdiction. At the Effective Time, each of the agreements, contracts and instruments required by this Agreement to be delivered by the Purchaser will be duly executed and delivered by the Purchaser and will be legal, valid and binding obligations of the Purchaser, enforceable against the Purchaser by the Vendor in accordance with their respective terms, except as enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally and except that equitable remedies may only be granted in the discretion of a court of competent jurisdiction.

**6.3 No Violation.** The execution and delivery of this Agreement by the Purchaser and the consummation of the transactions herein provided for will not result in the violation of, or constitute a default under, or conflict with or cause the acceleration of any obligation of the Purchaser under:

- (a) any Contract to which the Purchaser is a party or by which it is bound;
- (b) any provision of the constating documents or by-laws or resolutions of the board of directors (or any committee thereof) or shareholders of the Purchaser;
- (c) any judgment, decree, order or award of any court, governmental body or arbitrator having jurisdiction over the Purchaser; or
- (d) any applicable law, statute, ordinance, regulation or rule.

**6.4 Consents and Approvals.** Except as set out in Schedule 6.4, there is no requirement for the Purchaser to make any filing with, give any notice to or obtain any license, permit, certificate, registration, authorization, consent or approval of, any government or regulatory

authority as a condition to the lawful consummation of the transactions contemplated by this Agreement.

**6.5 Litigation and Other Proceedings.** There are no Proceedings against or involving Purchaser (whether in progress or threatened) which might delay or interfere with the transactions contemplated by this Agreement.

**6.6 Accuracy.** Neither this Agreement nor any document or certificate to be provided by the Purchaser pursuant to this Agreement contains any untrue statement of a material fact or omits to state any material fact necessary to make any of the statements contained herein or therein not misleading.

**6.7 No Knowledge.** To the knowledge of the Purchaser, there exist no facts relating to the Purchaser or Wendy's International, Inc. which, if known to the Vendor, might reasonably be expected to deter the Vendor, using reasonable commercial judgment, from completing the transactions herein contemplated.

## **7. COVENANTS**

### **7.1 Bankruptcy Matters.**

- (a) **Filing of Bankruptcy Case.** As promptly as practicable, and in any event no later than March 2, 2004, each of Bess Eaton and Gencarelli shall commence a case in the Bankruptcy Court pursuant to Chapter 11 (each, a "Bankruptcy Case," and collectively, the "Bankruptcy Cases").
- (b) **Bidding Procedures.** As promptly as practicable, and in any event no later than March 3, 2004, each of Bess Eaton and Gencarelli shall file a motion in its or his Bankruptcy Case (and thereafter Bess Eaton and Gencarelli shall use their best efforts to cause such motions to be approved by the Bankruptcy Court as promptly as possible) seeking orders of the Bankruptcy Court establishing procedures for a sale of all of the Purchased Assets pursuant to Section 363 of the Bankruptcy Code (such orders collectively, the "Bidding Procedures Order"), which procedures shall include along with other provisions reasonably requested by the Purchaser, all of the following provisions
  - (i) That if the Purchased Assets or any material portion thereof are sold to any person other than the Purchaser or its Affiliates, whether in a sales transaction or other transaction having the same effect, Bess Eaton and Gencarelli shall pay to the Purchaser from the sale proceeds on the closing of such sale or other transaction a fee in the amount of the lesser of (A) the aggregate amount of all out-of-pocket expenses incurred by Tim Donut and its Affiliates in connection with the transactions contemplated by this Agreement, including without limitation in connection with the negotiation and drafting of this Agreement and related documentation, due diligence investigations, environmental investigations and testing (including Phase 1 and Phase 2 testing), title and other real estate

searches, investigations, and surveys, and legal and other professional services, or (B) \$500,000 (the "Break-Up Fee").

- (ii) That in the event any person makes a competing bid for the Purchased Assets or any material portion of them, for the bid to be a qualifying bid, the competing bidder must tender a cash deposit of at least \$500,000, and the bid must be in at least the amount of the sum of the Purchase Price, plus the Break-Up Fee. Plus \$100,000, and otherwise be on terms not substantially less favorable to Bess Eaton and Gencarelli as those of this Agreement.
  - (iii) That after any initial competing bid has qualified under the foregoing clause (ii), any further competing bids must evidence an increase of at least \$100,000 over the then highest competing bid.
- (c) **Sale Motion and Approval Order.** As promptly as practicable, and in any event not later than March 3, 2004, Bess Eaton and Gencarelli shall file a motion in its and his Bankruptcy Cases to obtain a date for a hearing by the Bankruptcy Court to approve the transactions contemplated by this Agreement pursuant to the Approval Order. Each of Bess Eaton and Gencarelli shall provide due notice of the hearing by mail to creditors of its or his estate, all as required by and in accordance with Bankruptcy Rule 2002, and shall cooperate with the Purchaser in arranging, at the Purchaser's expense, for notice of the hearing to be published in one or more major newspapers or similar publications of general circulation in each of Providence, Rhode Island, Boston, Massachusetts, and Hartford, Connecticut, as contemplated by Bankruptcy Rule 2002(l) as a desirable supplement to the notice by mail. Bess Eaton and Gencarelli shall use their best efforts to obtain as promptly as practicable the entry by the Bankruptcy Court in each of the Bankruptcy Cases of an order, in form and substance satisfactory to the Purchaser, pursuant to Sections 363, 364 and 365 of the Bankruptcy Code (such orders, collectively, the "Approval Order"), which shall approve this Agreement and the transactions described herein, and which shall include, along with other provisions reasonably requested by the Purchaser, all of the following provisions (it being understood that certain of such provisions may be contained in either the findings of fact or conclusions of law to be made by the Bankruptcy Court as part of the Approval Order):
  - (i) That pursuant to Section 363(f) of the Bankruptcy Code the transfers of the Purchased Assets to the Purchaser (A) are or will be legal, valid, and effective transfers of the Purchased Assets, (B) vest or will vest in the Purchaser all of the respective rights, titles, and interests of Bess Eaton and Gencarelli (notwithstanding that the language of Sections 2.1 and 2.2 is not worded in terms of such a "quitclaim" grant) in and to the Purchased Assets, free and clear of all interests and encumbrances, and free and clear of all "liens" and "claims" (which terms as used in this Section 7.1 have the meanings ascribed to them in Sections 101(37) and 101(5) of

the Bankruptcy Code, respectively) whatsoever, known or unknown, fixed, liquidated, contingent, or otherwise, including without limitation, of any of Bess Eaton's and Gencarelli's respective creditors, vendors, suppliers, employees, or lessors and any other person that is the holder of one of such claims (collectively "Claimants"), including without limitation all liabilities, debts, claims, liens, pledges, offsets, set-offs, recoupments, and charges, employment related claims, payroll taxes, and successor, product, environmental, tax, and other liabilities, whether arising under contract, in tort, under statute or regulation, or otherwise, and the Purchaser shall not be liable in any way (as successor entity or otherwise) for any claims that any of the Claimants or any other third party may have against Bess Eaton, Gencarelli, the Business and/or the Purchased Assets, and permanently enjoins and restrains the assertion and prosecution of any claims by Claimants or any other third party against the Purchaser and the Purchaser's affiliates, successors, and assigns and the ownership, use, and operation of the Bess Eaton Assets, other than claims on the account of Assumed Liabilities and claims of Bess Eaton's and Gencarelli's permitted successors and assigns in respect of any breach or default of the Purchaser under this Agreement; and (C) constitute transfers for reasonably equivalent value and fair consideration under the Bankruptcy Code and the laws of Connecticut, Massachusetts, and Rhode Island and any other applicable state laws;

- (ii) That approves the assumption and assignment by Bess Eaton and Gencarelli, as applicable, of the Assumed Contracts, the Assumed Licenses, and the Leases of Real Property pursuant to Sections 363 and 365 of the Bankruptcy Code, defines the relevant cure amounts, if any, identifies the correct version of each such contract or agreement, enjoins the other party to such contract or agreement from raising after the date of the assumption and assignment that there are any uncured defaults under such contract, holds that any party that may have had the right to consent to the assignment of such contract or agreement is deemed to have consented to such assignment as required by Section 365(e)(2)(A)(ii) of the Bankruptcy Code if it fails to object to the assumption and assignment, and orders Bess Eaton and Gencarelli, as applicable, to pay any cure amounts payable to the other parties to such contracts or agreements unless such cure amounts are paid by the Purchaser and are deducted from the Purchase Price consistent with the terms of this Agreement;
- (iii) That all persons are enjoined from taking any action against the Purchaser and the Purchaser's affiliates, successors, and assigns, and the directors, officers, employees, and other representatives

and personnel of any of these, to recover any claim which such person has or at any time had or may have against Bess Eaton or Gencarelli or any of their respective affiliates;

- (iv) That the borrowing by Bess Eaton of the mortgage loan, the granting by Bess Eaton of the First Mortgage, and the granting by Gencarelli of the guaranty, all as referred to in Section 7.25, are approved pursuant to Section 364 of the Bankruptcy Code upon the terms described in Section 7.25, with the proceeds of the mortgage loan, to the extent required, being used to discharge any indebtedness or other liabilities secured by a mortgage, security interest or other lien in or on any of the properties to be subject to the First Mortgage;
- (v) That the Bankruptcy Court retains exclusive jurisdiction to interpret, construe, and enforce the provisions of this Agreement and the Approval Order in all respects; provided that in the event the Bankruptcy Court abstains from exercising or declines to exercise jurisdiction with respect to any matter provided for in this clause or is without jurisdiction, such abstention, refusal, or lack of jurisdiction shall have no effect upon and shall not control, prohibit, or limit the exercise of jurisdiction of any other court having competent jurisdiction with respect to any such matter;
- (vi) That the provisions of the Approval Order are non-severable and mutually dependent;
- (vii) That the transactions contemplated by this Agreement are undertaken by the Purchaser, Bess Eaton, and Gencarelli at arms' length, without collusion, and in good faith within the meaning of Sections 363(m) and 364(e) of the Bankruptcy Code, and such parties are entitled to the protections of Sections 363(m) and 364(e) of the Bankruptcy Code;
- (viii) That selling the Purchased Assets free and clear of liens and claims is in the best interest of Bess Eaton's and Gencarelli's respective bankruptcy estates;
- (ix) That a sale of the Purchased Assets other than one free and clear of liens and claims would be of substantially less benefit to Bess Eaton's and Gencarelli's respective bankruptcy estates;
- (x) That Bess Eaton and Gencarelli may assign and transfer to the Purchaser all of their respective rights, titles, and interests (including common-law rights) in and to any intangible property included within the Purchased Assets;



- (xi) That provides for the retention of jurisdiction by the Bankruptcy Court to resolve any and all disputes that may arise under or in connection with this Agreement as between or among the Purchaser, Bess Eaton, and Gencarelli, and further to hear and determine any and all disputes between or among the Purchaser Bess Eaton, and/or Gencarelli and any other party relating to (x) the assignment to the Purchaser under this Agreement of any of the Assumed Contracts, the Assumed Licenses, or the Leases of Real Property or (y) any claim relating to any liability not assumed by the Purchaser hereunder;
  - (xii) That except as required by the Bankruptcy Code, provides for the waiver of any applicable creditor-notification law, including without limitation any applicable "bulk-transfer" or similar laws in all relevant jurisdictions;
  - (xiii) That provides that the Purchaser does not assume and has no liability for any of Bess Eaton's or Gencarelli's liabilities or obligations whatsoever other than as specifically set forth in this Agreement with respect to the Assumed Liabilities;
  - (xiv) That the intended use to which the Purchaser proposes to put each property included in the Leased Property (except stores 911 and 935) is consistent with the uses permitted by the Assumed Lease pursuant to which Bess Eaton leases such property and will be permitted under such Assumed Lease;
  - (xv) That the Approval Order may be recorded in lieu of, and with the same legal effect as, a memorandum of lease with respect to any or all of the Leases of Real Property;
  - (xvi) That not later than five business days following the Closing Date Bess Eaton shall change its name and the name of any of its Affiliates which include the words "Bess Eaton" to a name which does not include the words "Bess Eaton" or any part thereof or any similar words; and
  - (xvii) That the Purchaser shall be entitled to direct and control all proceedings relating to the determination of amounts necessary to be paid to cover claims for damages resulting from rejections of Excluded Leases by Bess Eaton.
- (d) **Appeals.** If the Approval Order or any other order of the Bankruptcy Court relating to this Agreement is appealed by any person (or a petition for certiorari or motion for rehearing or reargument is filed with respect thereto), Bess Eaton and Gencarelli shall promptly take all steps as may be necessary or appropriate to defend against such appeal, petition, or motion. Bess Eaton and Gencarelli, in

conjunction with the Purchaser, shall use their best efforts to ensure that the Approval Order shall be effective and final and shall not be stayed, immediately upon entry pursuant to Bankruptcy Rule 6004(g). Bess Eaton and Gencarelli shall use best efforts to obtain an expedited resolution of any such appeal; provided that nothing herein shall preclude the parties hereto from consummating the transactions contemplated herein if the Approval Order shall have been entered and has not been vacated or stayed, in which event the Purchaser shall be entitled to the benefits of Sections 363(m) and 364(e) of the Bankruptcy Code.

- (e) **Cooperation.** Bess Eaton and Gencarelli shall cooperate with the Purchaser and its representatives in connection with the Approval Order and the related bankruptcy proceedings. Such cooperation shall include without limitation keeping the Purchaser apprised of, and consulting with the Purchaser as it may request, concerning the status of such proceedings, and providing the Purchaser with copies of all pleadings, notices, proposed orders, and other documents relating to such proceedings as soon as reasonably practicable in connection with any submission thereof to the Bankruptcy Court (including where reasonably practicable, with respect to submissions by Bess Eaton or Gencarelli, providing copies thereof a reasonable time prior to submission to the Bankruptcy Court). Bess Eaton and Gencarelli agree that the terms of any plan submitted by Bess Eaton to the Bankruptcy Court for confirmation shall not conflict with, supersede, abrogate, nullify, modify, or restrict the terms of this Agreement and the rights of the Purchaser hereunder, or in any way prevent or interfere with the consummation or performance of the transactions contemplated by this Agreement, including without limitation any transaction that is contemplated by or approved pursuant to the Approval Order.

**7.2 Access to Purchased Business and Purchased Assets.** Subject to the Confidentiality Agreements, the Vendor shall forthwith make available to the Purchaser and its authorized representatives and, if requested by the Purchaser, provide a copy to the Purchaser of, all title documents, Contracts, financial statements, policies, plans, reports, licenses, orders, permits, books of account, accounting records and all other documents, information and data relating to the Purchased Assets and the Purchased Business. The Vendor shall afford the Purchaser and its authorized representatives every reasonable opportunity to have free and unrestricted access to the Purchased Assets and all other property and assets utilized in the Purchased Business (including but not limited to wells and septic systems). At the request of the Purchaser, the Vendor shall execute such consents, authorizations and directions as may be necessary to permit any inspection of the Purchased Business or any of the Purchased Assets (including but not limited to wells and septic systems) or to enable the Purchaser or its authorized representatives to obtain full access to all files and records relating to any of the Purchased Assets maintained by governmental or other public authorities (including but not limited to wells and septic systems). The exercise of any rights of inspection by or on behalf of the Purchaser under this Article 7 shall not mitigate or otherwise affect the representations and warranties of the Vendor hereunder which shall continue in full force and effect as provided in Section 10.1.

**7.3 Access to Third Parties.** At the Purchaser's request, the Vendor shall co-operate with the Purchaser in arranging any such meetings as the Purchaser may reasonably request with: (a)

employees of the Vendor; (b) customers, suppliers, distributors or others who have or have had a business relationship with the Vendor; and (c) auditors, accountants, bankers, solicitors or any other persons engaged or previously engaged to provide services to the Vendor who have knowledge of matters relating to the Purchased Business or the Purchased Assets. The Vendor shall authorize and permit its bankers to make full disclosure to the Purchaser and its representatives. The Vendor shall cause its auditors and accountants to make available to the Purchaser, on reasonable notice, all working papers within the possession or control of such auditors and accountants pertaining to the Financial Statements.

#### **7.4 Environmental Auditing, Geotechnical Review.**

- (a) Without limiting the generality of Sections 7.2 and 7.3, Bess Eaton and Gencarelli shall permit the Purchaser's representatives or consultants to
  - (i) conduct all such interviews with Bess Eaton employees and others, testing, inspections, review of Bess Eaton files, audits (Phase I, Phase II and other investigations which the Purchaser considers appropriate) and assessments in respect of environmental matters with respect to such locations of the Purchased Business and other Purchased Assets as the Purchaser may determine, in its sole discretion, as may be required to satisfy the Purchaser in respect of such matters, and Bess Eaton and Gencarelli shall co-operate in all respects therewith including, without limitation, obtaining any required or desirable consent or approval of any landlord; and
  - (ii) conduct a geotechnical soil test at store 929.

The Purchaser shall hold the Vendor harmless in respect to any damage to property done by such inspections. Each Vendor acknowledges and agrees that no action taken by Purchaser or by its representatives or consultants hereunder shall constitute a trespass by Purchaser or the taking of possession, management, care, control or charge of any Purchased Asset owned or leased by a Vendor. In furtherance of the foregoing provisions of this Section 7.4, each Vendor covenants and agrees that it will, immediately upon a request therefor from Purchaser, unless otherwise agreed, secure all consents, directions, authorizations and permissions necessary or required to permit Purchaser and its representatives or consultants to access, undertake and complete the foregoing investigations and will use all commercially reasonable efforts to provide Purchaser, its representatives, consultant, and attorneys, with all consents, directions, authorizations and permissions necessary for the release to Purchaser, to the consultants and to Purchaser's attorneys and solicitors of information, records and files maintained by governmental entities and all other public and private persons, entities and organizations with respect to environmental matters in, at or about the Purchased Assets;

- (b) After the conclusion of Purchaser's environmental and geotechnical due diligence, but no later than the earlier to occur of (i) two weeks prior to the Bankruptcy Court hearing on the motion to enter the Approval Order, and (ii)

March 31, 2004, Purchaser shall (i) notify Vendor in writing of its good faith estimate (the "Environmental Cost Estimate") of the aggregate Environmental Costs required with respect to all Purchased Assets on which it has conducted environmental due diligence (showing separate estimates in respect of the Purchased Assets that are owned by the Vendor and those that are leased) and its good faith estimate of any required costs to remedy any deficiencies revealed by the geotechnical soil test (the "Other Estimated Costs") and (ii) provide Vendor with copies of the reports prepared by the environmental consultant with respect to each Purchased Asset in respect of which environmental due diligence was conducted and the reports re geotechnical testing. In the event the Environmental Cost Estimate and the Other Estimated Costs in aggregate exceed \$150,000 Vendor shall have the option to either (y) remedy environmental matters and other identified matters relating to the Vendor so that the estimated Environmental Costs after such remedial actions and the Other Estimated Costs in aggregate are equal to or less than \$150,000, (z) reduce the Bess Eaton Assets Purchase Price or, as the case may be, the Gencarelli Assets Purchase Price by an amount equal to the amount by which the Environmental Cost Estimate for sites owned by the Vendor and the Other Estimated Costs in aggregate exceed \$150,000. If no such remedial action is taken and successfully completed and no such purchase price adjustment is established prior to Closing, Purchaser shall be entitled to terminate this Agreement in accordance with Article 8 hereof. In the event the Environmental Cost Estimate for sites leased by the Vendor exceeds \$25,000 for any individual location or \$220,000 in aggregate the Purchaser shall have the right (whether or not the Vendor disagrees with the Environmental Cost Estimate for leased sites) to either exclude any one leased site from the transaction (with the Purchase Price being reduced by the amount allocated to such assets) or to terminate this Agreement. If the Vendor disagrees with the Environmental Cost Estimate or the Other Estimated Costs in respect of the sites owned by the Vendor it may elect to retain at its own expense its own environmental or other consultant to conduct testing and make its own assessment of such costs. The Closing shall proceed with the amount by which the Purchaser's Environmental Cost Estimate for sites owned by the Vendor and Other Cost Estimate in aggregate exceed \$150,000, being deducted from the Purchase Price and placed into escrow in an interest bearing account with an escrow agent chosen by the Purchaser (the "Environmental Escrow") to be used only for remedial costs pending determination of the dispute on the following basis:

- (i) Once the Vendor's consultant's estimate of such costs is provided in writing to the Purchaser the parties shall within 7 days meet in an attempt to reach agreement on the amount of such costs and any agreed amount shall be applicable and any excess funds in the Environmental Escrow shall be released to the Vendor (provided all Vendor creditors have been paid), or
- (ii) failing agreement the matter shall be determined by the Bankruptcy Court.

**7.5 Title.** The Vendor shall deliver to the Purchaser on Closing as authorized by the Approval Order:

- (a) Deed of the Gencarelli Assets in recordable form, and assignments of leases of the Leased Property, in recordable form to the extent that such leases, notices of, memoranda of, or short forms of such leases are recorded, transferring good and marketable title and leasehold title, respectively, transferring good and marketable title and leasehold title, respectively, suitable to be insured by the Purchaser's title insurer on its standard owners form including endorsements in a form acceptable to the Purchaser with only those exceptions which the Purchaser is prepared to accept, free and clear of all mortgages, charges or other encumbrances except for Permitted Encumbrances.
- (b) The Purchaser shall provide and pay the cost of a title insurance policy from the Purchaser's title insurer insuring the Leased Property and the owned Gencarelli Assets. The Purchaser shall also pay the cost of obtaining a survey of the owned Gencarelli Assets in a form required to produce a title insurance policy which the Purchaser is prepared to accept.
- (c) The Purchaser shall review the title insurance commitment and deliver notice of any objections to title no later than the earlier to occur of (i) two weeks prior to the Bankruptcy Court hearing on the motion to enter the Approval Order, and (ii) March 31, 2004. The Vendor shall, on or before the Closing Date cure or attempt to cure the matters objected to and if the Vendor shall be unwilling or unable to do so and the Purchaser will not waive, the Purchaser shall have the right to exclude up to 2 pieces of real property owned by Gencarelli from the transaction, reduce the Purchase Price by the amount allocated to such properties under Schedule 3.5 until such objections to title are cured, complete the transactions contemplated by this Agreement in respect of the balance of the Purchased Assets and complete the purchase of such excluded assets once such objections to title are cured. If the Purchaser does not elect to exclude such real property on which there are uncured objections to title and if the Purchase will not waive its objections this Agreement shall, notwithstanding any intermediate acts or negotiations in respect of such objections, be null and void and the Additional Deposit shall be returned to the Purchaser, provided that any termination shall be without prejudice to the Purchaser's rights pursuant to Article 11 hereof.

**7.6 Access for Government Inspections.** Prior to the Bankruptcy Court hearing on the motion to enter the Approval Order and subject to the rights of any other occupants of any property comprising part of the Purchased Assets, the Purchaser shall be entitled to cause a full inspection of the Leased Property and the Gencarelli Assets to be made by municipal, building department, zoning department, environmental department, fire department, health officials and such other appropriate authorities as the Purchaser or its counsel may consider necessary or advisable at any time and from time to time prior to the Closing Date in order to ensure that such properties comply with all applicable statutes, by-laws and regulations. The Vendor shall provide any consents or authorizations (written or otherwise) necessary or desirable to enable the

Purchaser or its counsel to carry out such investigations as they may consider necessary or advisable, as soon as reasonably practicable after request by the Purchaser therefor.

**7.7 Delivery of Books and Records.** At the Effective Time, there shall be delivered to the Purchaser by the Vendor all the books and records described in Section 2.1(j). The Purchaser agrees that it will preserve the books and records so delivered to it for a period of six years from the Closing Date, or for such longer period as is required by any applicable law, and will permit the Vendor or its authorized representatives reasonable access thereto in connection with the affairs of the Vendor relating to the Purchased Business, but the Purchaser shall not be responsible or liable to the Vendor for or as a result of any accidental loss or destruction of or damage to any such books or records. The Vendor will allow the Purchaser or its authorized representative reasonable access to the Vendor's records as reasonably necessary for a period of seven years following Closing.

**7.8 Change and Use of Name.** Bess Eaton agrees that within five business days after the Closing Date it shall change its name as provided in the Approval Order.

**7.9 Conduct of Purchased Business Prior to Closing.** Without in any way limiting any other obligations of Bess Eaton and Gencarelli hereunder, and excluding the transactions set forth in Schedule 1.7, during the period from the date hereof to the Effective Time:

- (a) ***Conduct Business in the Ordinary Course*** Without limiting the generality of any other obligation of the Vendor hereunder, the Vendor shall conduct the Purchased Business only in the ordinary course of business and consistent with the Bankruptcy Code;
- (b) ***No Unusual Transactions*** Neither Vendor shall, without the prior written consent of the Purchaser, enter into any transaction or refrain from doing any action that, if effected before the date of this Agreement, would constitute a breach of any representation, warranty, covenant or other obligation of either Vendor contained herein;
- (c) ***No Material Contracts*** Neither Vendor shall not enter into any material supply arrangements or make any material decisions or enter into any Material Contracts, amendments, renewals or extensions of Material Contracts without the consent of the Purchaser, which consent shall not be unreasonably withheld;
- (d) ***Continue Insurance*** The Vendor shall continue to maintain in full force and effect all policies of insurance or renewals thereof now in effect, shall take out, at the expense of the Purchaser, such additional insurance as may be reasonably requested by the Purchaser and shall give all notices and present all claims under all policies of insurance in a due and timely fashion;
- (e) ***Contractual Consents*** The Vendor shall use its best efforts to give or obtain, at or prior to the Effective Time, the notices, consents and approvals described in Schedule 5.18B;

- (f) **Preserve Goodwill** Without limiting the generality of any other obligation of the Vendor hereunder, the Vendor shall use its best efforts to preserve intact the Purchased Business and Purchased Assets and to carry on the Purchased Business in the ordinary course of business, and the Vendor shall use its best efforts to promote and preserve for the Purchaser the goodwill of suppliers, customers and others having business relations with the Vendor;
- (g) **Discharge Liabilities** The Vendor shall pay and discharge the post-bankruptcy liabilities of the Vendor in the ordinary course of business or make arrangements satisfactory to the Purchaser for payment of such liabilities on or before Closing, except those contested in good faith by the Vendor;
- (h) **Corporate Action** The Vendor shall use its best efforts to do all things and take all steps to complete the transactions contemplated by this Agreement, including to take or cause to be taken all necessary corporate and other action, steps and proceedings to approve or authorize validly and effectively the transfer of the Purchased Assets to the Purchaser and the execution and delivery of this Agreement and the other agreements and documents contemplated hereby and to cause all necessary meetings of directors and shareholders of Bess Eaton to be held for such purpose;
- (i) **Best Efforts.** The Vendor shall use their best efforts (without being required to commence litigation to compel a consent or spend in excess of \$5,000 (excluding amounts owing by Vendor) to obtain a consent) to satisfy the conditions contained in Section 8.1 including, without limitation, the condition contained in Section 8.1(f);
- (j) **Leases** No leases shall be renewed, amended or terminated and no actions shall be taken or omitted which would prevent the full enjoyment of any lease or assumed contract for its full term and any renewals without the prior written consent of the Purchaser;
- (k) **Compliance with Bankruptcy Laws.** At all times after the commencement of the Bankruptcy Cases, Bess Eaton and Gencarelli shall comply with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and all orders of the Bankruptcy Court; and
- (l) **Contest Inconsistent Proceedings.** Bess Eaton and Gencarelli shall vigorously contest any suit, action, or other proceeding that seeks to prohibit or in any way restrain, hinder, or delay the consummation of the transactions contemplated by this Agreement (but, for Bess Eaton, after the commencement of the Bankruptcy Cases, only to the extent not inconsistent with the requirements of the Bankruptcy Code).

**7.10 Delivery of Documents.** The Vendor shall deliver to the Purchaser all necessary deeds, conveyances, bills of sale, assurances, transfers, assignments, landlord consents, and Bankruptcy Court approvals where required and any other documentation necessary or reasonably required to

transfer the Purchased Assets to the Purchaser with a good and marketable title, free and clear of all Encumbrances whatsoever except for Permitted Encumbrances, including non-disturbance agreements from mortgagees in a form reasonably satisfactory to Purchaser and estoppel certificates from landlords and tenants confirming among other matters no existing defaults.

**7.11 Delivery of Vendor's Closing Documentation.** Bess Eaton shall deliver to the Purchaser a certificate of status and two copies, certified by a senior officer of Bess Eaton as of the Closing Date, of its constating documents and by-laws and of the resolution authorizing the execution, delivery and performance by Bess Eaton of this Agreement and any documents to be provided by it pursuant to the provisions hereof. Gencarelli shall execute and deliver to the Purchaser and Bess Eaton shall cause to be executed and delivered to the Purchaser the non-competition agreement referred to in Section 8.1(k). The Vendor shall also execute and deliver or cause to be executed and delivered to the Purchaser two copies of such other documents relevant to the closing of the transactions contemplated hereby as the Purchaser, acting reasonably, may request.

**7.12 Delivery of Purchaser's Closing Documentation.** The Purchaser shall deliver to the Vendor a certificate of status and two copies, certified by a senior officer of the Purchaser as of the Closing Date, of its constating documents and by-laws and of the resolution authorizing the execution, delivery and performance by the Purchaser of this Agreement and any documents to be provided by it pursuant to the provisions hereof. The Purchaser shall also execute and deliver or cause to be executed and delivered two copies of such other documents relevant to the closing of the transactions contemplated hereby as the Vendor, acting reasonably, may request.

**7.13 Employees.**

- (a) Bess Eaton agrees to provide the Purchaser with an up-to-date list of the names of the Employees at least two business days and not more than four business days prior to the Closing Date.
- (b) Bess Eaton plans to close stores 906, 921, 931, 937, 938, and 954, (the leases for which are in referred to as the "Excluded Leases") but the Purchaser will attempt to relocate employees from the Sites to be Closed to other stores to the extent possible. The Purchaser agrees that it shall offer employment at will to all Employees on such list working in the Bess Eaton shops, other than the Employees listed in Schedule 7.15A (which Schedule 7.15A the Purchaser will provide to the Vendor at least 10 days prior to the Closing Date) and Louis Gencarelli (the "Excluded Employees"), effective as at the Effective Time, on substantially equivalent terms and conditions of employment as are then applicable to the Employees. With respect to head office employees of Bess Eaton the Purchaser will offer employment at will on terms substantially equivalent to their present terms of employment to (a) operations staff (i.e. District Managers), and (b) the "Key Administrative Employees", separately designated in a letter from Purchaser to Bess Eaton, for 6 months from the Closing Date. With respect to other head office employees Purchaser is reviewing its staffing requirements. Purchaser will advise Vendor prior to Closing of any head office employees whose services are not required and Vendor



agrees to terminate such employees on Closing. If any of the Key Administrative Employees are terminated following the 6 month employment period following the Closing Date, they will receive severance of 2 weeks per year of service with Bess Eaton up to a maximum of 26 weeks. If the Key Administrative Employees are terminated, at any time, for cause, they shall not be entitled to any severance pay or the balance of pay for any remaining unworked time. "For cause" shall not include layoffs or any adverse change in the Purchaser's financial position.

- (c) Bess Eaton shall indemnify and hold harmless the Purchaser from and against all Losses suffered or incurred by the Purchaser as a result of or arising directly or indirectly out of, in connection with or pursuant to any claims by any employees of the Purchased Business, other than claims by Transferred Employees who accept the Purchaser's offers of employment with respect to their employment with the Purchaser.
- (d) No employee of Bess Eaton shall be entitled to any rights under this Section 7.13 or under any other provisions of this Agreement.
- (e) Bess Eaton shall employ all of the Employees set out in Schedule 5.30A until the Effective Time except for any employees who prior to the Effective Time: (i) are terminated for cause; (ii) are terminated with the Purchaser's consent, which consent shall not be unreasonably withheld; (iii) voluntarily resign; or (iv) retire.
- (f) Bess Eaton shall not hire any additional employees except to fill a position (on substantially the same terms and conditions) vacated as set out in Section 7.13(e), and under no circumstances shall Bess Eaton, up to the Effective Time, hire any person who is a related person to Bess Eaton.
- (g) Bess Eaton shall not attempt in any way to discourage any of the Employees from accepting any offer of employment to be made by the Purchaser.

#### **7.14 Health and Other Benefit Plans**

- (a) Effective as of the Closing Date, the Purchaser shall establish or cause to be established, at its own expense, benefit plans (the "Purchaser Benefit Plans") to provide health care, accidental death and dismemberment insurance, vision and other employee and fringe benefits (not necessarily equivalent to that of Bess Eaton) on a shared cost basis for those Employees who accept the offers of employment to be made by the Purchaser pursuant to Section 7.13(b) (the "Transferred Employees"), incurred on and after the Closing Date.
- (b) Effective as of the Closing Date, such Transferred Employees who participate in the Benefit Plans according to the terms thereof shall cease to participate in and accrue benefits under the Benefit Plans and shall commence participation in and accrual of benefits under the Purchaser Benefit Plans in accordance with, and subject to, the membership, eligibility and coverage requirements thereof. Regardless of when a claim is made or filed, Bess Eaton shall retain responsibility under the Benefit Plans for all amounts payable by reason of or in connection with

any and all claims incurred by the Transferred Employees and Benefit Plan Members prior to the Closing Date as well as claims for recurrences of injury or illness made on or after the Closing Date which continue to be covered under the Benefit Plans in accordance with the terms thereof. For the purposes of this Section 7.13(b) a claim shall be deemed to have been "incurred" on the date of occurrence of an injury, diagnosis of an illness, or any other event giving rise to such claim or series of claims.

- (c) Transferred Employees who are not participants in the Benefit Plans on the Closing Date shall become participants in and accrue benefits under the Purchaser Benefit Plans on the Closing Date in accordance with, and subject to, the membership, eligibility and coverage requirements thereof.
- (d) For the purposes of determining whether the maximum amounts payable for such claims under the Benefit Plans and the Purchaser Benefit Plans have been reached during the time period (specified in such plans) in which the Closing Date occurs, claims paid under the Benefit Plans and those paid under the Purchaser Benefit Plans in any such time periods shall be aggregated.

**7.15 Store 949.** The owner of Bess Eaton location 949 is rebuilding the Bess Eaton premises at that location. Notwithstanding any other provision of this Agreement, the portion of the Bess Eaton Purchase Price allocated to that location (\$349,897) shall be held in escrow pursuant to an escrow agreement reasonably acceptable to the Vendor and the Purchaser until possession of those premises and an occupancy permit therefor are delivered to the Purchaser, which is currently expected to be around June 1, 2004. If possession of those premises and an occupancy permit therefor are not delivered to the Purchaser on or before September 1, 2004, then such premises and the lease therefor shall be an Excluded Asset and an Excluded Liability and the escrowed funds shall promptly be remitted to the Purchaser.

**7.16 Groton Site.** The Purchaser agrees, subject to its customary due diligence, to purchase from Gencarelli the property as described in Schedule 7.16 (the "Groton Property") in its current condition (which permits a drive-through to be installed on the property by special use permit) in exchange for payment of a purchase price of \$225,000. The Groton Property purchase price is already included in the Gencarelli Assets Purchase Price. The Vendor represents and warrants and the Purchaser acknowledges that a building permit which permits use as a drive-through by special use permit for the construction of a new store on the Groton Property must be obtained by April 11, 2004, or the special use permit for a drive-through will lapse. Vendor agrees to use its best efforts to obtain an extension for as long as possible of such deadline for obtaining a building permit or to obtain a building permit on or before April 11, 2004. Unless a building permit satisfactory to the Purchaser acting reasonably is not obtained on or before April 11, 2004, or no extension of such deadline for at least 120 days is obtained, the Purchaser may elect to exclude the Groton Property from the transaction and reduce the Gencarelli Assets Purchase Price by \$225,000.

**7.17 Personnel Access.** The Vendor will make Scott Spear, Charlie Germany, Terry Baker, Karen Larkin, Tim Henson, Max Cohen, Jason Martin and Gencarelli available on a reasonable basis to discuss the business and prospects of the Purchased Business.